QUARTERLY REPORT

of the

ATTORNEY GENERAL

of

ALABAMA

For the Period

October 1, 1950

Through December 31, 1950

Volume No. 61

TO ALL STATE AND COUNTY OFFICERS OF ALABAMA:

In accordance with Code 1940, Title 55, Section 228, I am submitting to you the Quarterly Report of the Opinions of the Attorney General of Alabama. This Report covers all opinions rendered by the Attorney General from October 1, 1950, through December 31, 1950.

The Section of the Code referred to above requires that seven copies of this Quarterly Report be sent to each of the Probate Judges in the State and the Probate Judge shall in turn deliver one volume each to the Clerk of the Circuit Court, the Sheriff, the Tax Collector, the Tax Assessor, the County Superintendent of Education, and Deputy or County Solicitor. Said Code Section also requires a copy of said Report to be sent each Circuit Solicitor and the chief executive officer of each incorporated municipality in the State.

If you have any suggestions to make regarding the improvement of the service, we should be glad to receive it.

The office of the Attorney General is anxious to render prompt and efficient service to the State and county officials.

Very respectfully,

A. A. CARMICHAEL,

Attorney General.

QUARTERLY REPORT
OF THE
ATTORNEY GENERAL

October, November and December, 1950

VOLUME 61

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OPINIONS

October 2, 1950

Hon. S. Fleetwood Carnley
Director of Industrial Relations
State of Alabama
Montgomery, Alabama

Department of Industrial Relations—Traveling Expenses.

1. Members of the Board of Appeals of the Department of Industrial Relations should be reimbursed for their actual traveling expenses incurred in carrying out their duties as provided by Title 26, Section 8, Code of Alabama 1940, as amended by Act No. 410, General Acts 1943, page 375, and Act No. 268, General Acts 1949, page 391.

2. Members of the Advisory Council of the Department of Industrial Relations should be reimbursed for their actual traveling expenses incurred in carrying out their duties as provided by Title 26, Section 231, Code of Alabama 1940.

Opinion by Assistant Attorney General Nachman.

Dear Sir:

Your request for an official opinion bearing date of August 24, 1950 is as follows:

"I respectfully request your opinion with respect to the following matters.

"Pursuant to the provisions of Section 231, Title 26, 1940 Code of Alabama, the Governor of the State has heretofore appointed an Advisory Council for the Employment Security Division within the Department of Industrial Relations.

"Section 231, supra, provides, 'Such advisory council . . . shall be reimbursed for any necessary traveling expenses.' Pursuant to the provisions of the law, I have heretofore promulgated a regulation to the effect that the members of said Council, while in the performance of their duties as such, shall be entitled to reimbursement of actual expenses incurred by them.

"Pursuant to the provisions of Section 8, Title 26, 1940 Code of Alabama, as amended 1943 and 1949, the Governor has heretofore appointed a Board of Appeals for the Department.

"Section 8, supra, as contained in the 1940 Code, provides that members of said Board shall receive 'a reasonable travel expense allowance, not exceeding that allowed to state employees'.

"The 1943 amendment to said Section 8, supra, (1943 General Acts of Alabama, p. 375, approved July 7, 1943) provided that members of the said Board shall receive 'actual travel allowances' while in the discharge of their duties. The 1949 amendment to this section (Act No. 268, 1949 Legislature) raised the total amount of per diem allowances to be paid to the members of the Board within each calendar year, but repeated

that the members shall receive 'actual travel allowances' while in the discharge of their duties.

"Pursuant to the provisions of this Section 8, supra, as amended 1943, I did, as Director of Industrial Relations, promulgate a regulation embodying the provisions of said amended section insofar as the same pertained to travel expense allowances; i. e., providing that members of said Board of appeals shall be reimbursed for their actual travel expenses incurred in the performance of their official duties.

"Section 154, Title 41, 1940 Code of Alabama, provided, with exceptions not hereto pertinent, that the maximum amount allowable to persons traveling in the service of the State or any of its agencies or institutions, was $3 per day. This section was amended in 1943 (1933, Ex. Sess. p. 81; 1943, p. 195, approved June 22, 1943), the only change in the language being the increase of the maximum amount allowable as expenses to persons traveling in the service of the State.

"This section was again amended August 23, 1949 (Act 425, 1949 Legislature), the only change being to raise the maximum expense allowances to persons traveling in the service of the State.

"Members of the Board of Appeals have heretofore been paid actual travel allowances since July 7, 1943, pursuant to the regulation mentioned above. No travel expenses have to date been incurred by members of the Advisory Council.

"The United States Department of Labor, which administers cooperatively with the states the Employment Security Program, and which is charged with seeing that state agencies expend grants from the Federal Government according to law, has refused to approve the legality of the aforementioned regulation dealing with expense allowances to members of the Advisory Council. It has likewise taken exception to and charged back to the Department travel allowances in excess of the maximum contained in the 1949 amendment to Section 154, Title 41, supra, paid by this Department to members of the Board of Appeals for travel expesses incurred after August 23, 1949, the effective date of the amendment to said Section 154, Title 41, supra.

"I respectfully request your opinion as to whether or not the provisions found in the 1949 amendment to Section 154, Title 41, supra, the same being in general terms, repeal the specific provisions found in Section 231, Title 26, supra, and in the 1943 and 1949 amendments to Section 8, Title 26, supra. Phrasing the question in another manner, is it your opinion that the two regulations mentioned hereinabove are legal exercises of the power reposing in me as Director of Industrial Relations for the State?"

Title 41, Section 154, Code of Alabama 1940, as amended by Act No. 238, General Acts 1943, page 195, and Act No. 425, General Acts 1949, page 607, is a general limitation on per diem expenses payable to employees of the State while traveling in the service of the State. This provision does not name any particular agency or agencies of the State whose employees are subject to the maximum amount set out in the provision. On the other hand, payment of actual traveling expenses to members of the Board of Appeals and the Advisory Council has been provided for in legislation applying specifically to those bodies. Title 26, Section 8 and Section 231, supra.

The specific provision covering expenses of members of the Board of Appeals is sufficient to except them from the general limitation of Title 41, Section 154; similiarly, the specific provisions governing expenses of the Advisory Council in Title 26, Section 231 have the same effect. See: Quarterly Report of Attorney General, Vol. 52, page 147, and Quarterly Report of Attorney General, Vol. 32, page 98, holding that specific provisions for payment of actual traveling expenses to a particular agency control as against the general limitation in Title 41, Section 154, supra.

In **Miller v. State ex rel. Peek,** 249 Ala. 14, 29 So. 2nd 411 (1947) it was held that the Commission Form of Government Act, covering all city employees, being a general law, had to give way to the specific provisions of the Civil Service Law applying to policemen and firemen. The court quoted the following from **City of Birmingham v. Southern Express Co.,** 164 Ala. 529, 51 So. 159 (1909) and **City of Montgomery v. National Bldg. & Loan Assn.** 108 Ala. 336, 18 So. 816 (1895), respectively:

> "Special provisions relating to specific subjects control general provisions relating to general subjects. The things specially treated will be considered as exceptions to the general provisions."

And

> "When the law descends to particulars, such more special provisions must be understood as exceptions to any general rules laid down to the contrary; and the general rule must not (vice verse) be alleged in confutation of the special provisions."

In **State v. Elliott,** 246 Ala. 439, 21 So. 2d 310, (1945) on the question of an appeal from the judgment of a probate court, it was held that a special statute authorizing such appeals only to the Circuit Court prevailed over the general statute which allowed appeals from final judgments, orders, etc. to either the Supreme Court or Circuit Court. The following was said:

> "These latter sections are general, however, while the statute concerning appeals of the kind here under consideration is a special provision, dealing with this specific subject, and is construed as an exception to the general law. In such a case the general yields to the exception and the exception controls."

In **Cooper v. State,** 28 Ala. App. 422, 187 So. 500, (1939) it was said:

> "The Act of 1935 . . . is a local act, and is not repealed by the general act amendatory of Section 3759 of the Code of 1923 . . . A general law does not repeal a special or local law, unless expressly provided. This is the rule universally recognized in this State. **Board of Revenue v. Johnson,** 200 Ala. 533, 76 So. 859."

In re Freeman, 49 F. Supp. 163 (District Court, S. D. Georgia 1943) also illustrates the rule in the following excerpt:

> "It is a general rule of law that specific legislation upon a particular phase of a single subject is not affected by a subsequent law relating to a general subject which neither refers to the earlier law nor is repugnant to nor inconsistent with it. Where there are **two statutes upon the same subject, the earlier being special and the latter general, the presumption**

is, in the absence of an express repeal, or an absolute incompatibility, that the special is intended to remain in force as an exception to the general." (Emphasis added).

It is therefore my opinion that:

1. The specific provisions of Title 26, Section 8, Code of Alabama 1940, as amended by Act No. 410, General Acts 1943, page 375, and Act No. 268, General Acts 1949, page 391; and Title 26, Section 231, Code of Alabama 1940, are controlling, as against the general limitation in Title 41, Section 154, Code of Alabama 1940, as amended by Act No. 238, General Acts 1943, page 195, and Act No. 425, General Acts 1949, page 607.

2. The two regulations promulgated by you providing for the payment of actual traveling expenses to members of the Board of Appeals and the Advisory Council are legal exercises of the power reposing in you as Director of Industrial Relations.

Very truly yours,

A. A. CARMICHAEL
Attorney General.

October 4, 1950

Hon. T. B. Wilder, Mayor
City of Andalusia
Covington County
Andalusia, Alabama

Municipalities—Zoning—Buildings.

1. The Board of Adjustment of the City of Andalusia has the authority to make special exceptions to the terms of the zoning ordinances in harmony with the general purpose and interest, and in accordance with general or specific rules therein contained.

2. In areas classified as Class "A" residential property the Board of Adjustment does not have unqualified authority to authorize the construction of business or industrial property but must be guided by the rule of practical difficulty and unnecessary hardship and the provisions of Title 37, Section 777, Code of Alabama 1940.

Opinion by Assistant Attorney General Halsey.

Dear Sir:

Your request for an official opinion, bearing date of September 9, 1950, is as follows:

"The City of Andalusia, Alabama, a municipal corporation, adopted a Zoning Ordinance March 26, 1948. Pursuant to the authority of this Zoning Ordinance and the State statutes, the City Planning Commission, and also Board of Adjustment were established. In recent months there has been a great deal of question and doubt as to the extent of the authority of the Board of Adjustment and of the City Planning Commission.

"At the present time we have a property owner who operates a small filling station and grocery store within the corporate limits of the City of Andalusia. The property on which this business is located is zoned as Class 'A' residential district. The filling station and grocery store were in existence prior to the adoption of the Zoning Ordinance of March 26, 1948, and this business has continued to operate until the present date. The owner of this business now wishes to enlarge the business and wants authorization from the City to construct additional facilities or commercial buildings to those already in existence. The primary questions presented to the Board of Adjustment at this time are:

"1. Under the provisions of said Zoning Ordinance and also under provisions of Title 37, Section 781 of the Alabama Code of 1940, does the Board of Adjustment have the authority to legally authorize this business owner to extend his commercial property into that area which has been classified as Class 'A' residential district?

"2. In the event the Board of Adjustment does not have this legal authority then would the recourse of the business owner be by petition to the City Planning Commission, notice thereon, and a subsequent amendment to the City Zoning Ordinance be enacted by the City Council as provided by Title 7, Sections 774-780 of the Alabama Code of 1940?

"3. In areas classified as Class 'A' residential property does the Board of Adjustment have the unqualified authority to legally authorize the construction of business or industrial property?

"In considering this inquiry your attention is respectfully called to Article 13, Section 131, page 35 of the Zoning Ordinance; Article 14, Section 141, page 36 of the Zoning Ordinance and Title 37, Sections 772-797 inclusive of the Alabama Code of 1940.

"For your convenience in this matter a copy of the Zoning Ordinance of the City of Andalusia, Alabama, is enclosed herewith."

It is my opinion that your first inquiry must be answered in the affirmative.

Article 13, Section 131, of the ordinance known as the "Zoning Ordinance of the City of Andalusia, Alabama," states as follows:

"SECTION 131. APPOINTMENT, DUTIES AND RESPONSIBILITIES. A Board of Adjustment is hereby established. The appointment, procedure, powers and actions of said Board of Adjustment shall be governed and controlled by Title 37, Chapter 16, Section 781, of the Code of Alabama of 1940, as the same may be amended."

Title 37, Section 781, Code of Alabama 1940, states, in pertinent part, as follows:

"§781. Board of Adjustment.—In availing itself of the powers conferred by this article, the legislative body of any incorporated city or town may provide for the appointment of a board of adjustment, and in the regulations and restrictions adopted pursuant to the authority of this article, may provide that the said board of adjustment shall in appropriate cases and subject to appropriate conditions and safeguards, make special ex-

ceptions to the terms of the ordinance in harmony with its general purposes and interest and in accordance with general or specific rules therein contained. * * * * *"

It appears clear that the municipal authorities intended that the Board of Adjustment be clothed with the authority to make special exceptions to the terms of the ordinance in harmony with the general purpose and interest, and in accordance with general or specific rules therein contained. This is in accord with many, if not all, jurisdictions which have treated the functions of bodies comparable to this State's statutorily created boards of adjustment. In **People ex rel. Sheldon et al. v. Board of Appeals of the City of New York et al.,** 234 N. Y. 484, 138 N. E. 416, the controversy concerned an allegation that the Board of Appeals, created by a statute similar in effect to the Alabama statute granting authority to establish zoning districts, Title 37, Sections 772-775, Code of Alabama 1940, had exceeded its authority in permitting an extension of a business building into a residential district. (Nearly all state enabling acts give the local legislative body power to establish a board of appeals, sometimes called a board of adjustment—Bassett on Zoning, page 117) The Court declared:

"The board of estimate and apportionment, pursuant to Chapter 601, Laws of 1917, amended the regulations of the zone resolution by conferring upon the board of appeals power in appropriate cases and subject to appropriate conditions and safeguards to determine and vary the application of the use district regulations in harmony with their general intent and purpose (section 7) also, where there are practical difficulties or unnecessary hardships in the way of carrying out the strict letter of the provisions of this resolution in a specific case, to vary any such provision in harmony with its general purpose and intent that substantial justice may be done (article 5, § 20). No question can arise as to the authority of the board of estimate and apportionment to thus amend the zone resolution regulations. The authority conferred by section 7 upon the board of appeals was to 'determine and vary' the use district regulations. By section 20 to 'vary' any provision of the resolution in a specific case, where substantial justice will result therefrom. The words 'determine and vary' as used in the statute and the amended zone resolution must receive a reasonable construction."

With regard to additions to nonconforming buildings, Mr. Bassett, in his work on zoning, supra, page 109, provides us with the following information:

"A nonconforming building cannot be enlarged as a matter of right. If it could be there might be no limit to the enlargement of a nonconforming factory. The new construction might destroy a residence district whereas the continuance of the original building would be comparatively harmless. The New York City building zone resolution provided that the Board of Appeals might in its discretion, as an item of original jurisdiction, issue a variance permit for an addition on land occupied by the original building and owned by the same person at the time that the resolution went into effect. This was intended to recognize the unfairness of forcing the removal of every store or factory that needed more space. It might be an extremely serious matter to destroy the old building with the goodwill attached to it. It was a question of a fair balance between the needs of the owner and the harm to the community. As time went on it was found that variances might in rare cases be fairly issued for extensions on adjoining land not owned at the time the resolution was passed. This was accompanied by basing the appeal on practical difficulty and unnecessary hardship. Boards of Appeals now

throughout the country recognize the occasional fairness of variances for extensions on those two grounds, and the item of original jurisdiction is usually omitted from the ordinance."

Apropos of the above quotation is the language found in the decision of **Falvo v. Kerner,** 222 A. D. 289, 225 N. Y. S. 747: "The board of appeals is clothed with discretionary power upon applications of this character" (for permission to construct a frame or stucco building to be occupied as a store and gasoline station within a class "B" residential use district). "The determination of the board was an administrative function, which should not be interfered with by the courts in the absence of proof that the board had abused the discretion with which it was clothed by the ordinance creating it. Lincoln Trust Co. v. Williams Building Corporation, 229 N. Y. 313, 128 N. E. 209; People ex rel. Werner v. Walsh, 212 App. Div. 635, 209 N. Y. S. 454, affirmed 240 N. Y. 689, 148 N. E. 760; Matter of Larkin Co. v. Schwab, 242 N. Y. 330, 151 N. E. 637."

The decision of the Alabama Supreme Court in line with the foregoing propositions is found in **White v. Board of Adjustment of City of Birmingham,** 245 Ala. 48, 15 So. 2d 585, where the petitioner had been denied issuance of a permit to continue renting apartments in her dwelling located in a residence district. The Court in affirming the action of the board stated, "One of the principal purposes of the board of adjustment is to apply the discretion of experts to exceptional instances where permits are desired, not strictly conforming to the regulations provided in the ordinance."

In view of the conclusions reached in answering your first inquiry, it is not necessary to answer your second inquiry regarding the recourse of the business owner in the event the Board of Adjustment does not have legal authority to authorize this business owner to extend his commercial property into that area which has been classified as Class "A" residential district.

With reference to your third inquiry, it is my conclusion from a study of the cases and zoning authorities that the answer must be in the negative.

Title 37, Section 777, Code of Alabama 1940, states as follows:
"§ 777. Purpose of regulations.—Such regulations shall be made in accordance with a comprehensive plan and designed to lessen congestion in the streets, to secure safety from fire, panic, and other dangers; to promote health and the general welfare, to provide adequate light and air; to prevent the overcrowding of land; to avoid undue concentration of population; to facilitate the adequate provisions of transportation, water, sewerage, schools, parks and other public requirements. Such regulations shall be made with reasonable consideration, among other things, to the character of the district and its peculiar suitability for particular uses, and with a view to conserving the value of buildings and encouraging the most appropriate use of land throughout such municipality."

Unless the board's decision be rendered in accordance with the provisions of the foregoing section and for the purposes therein set out, and further that its decision be free from abuse of discretion, then its order would be invalid. To that extent the board's authority to authorize legally the construction of business or industrial property in areas classified as Class "A" residential property is qualified.

In view of the broad scope of your third question, I deem it advisable to quote the following information from Mr. Bassett's work to aid you in clarifying the extent to which the authority of the Board of Adjustment is qualified. The author declared at page 121, et seq.:

" * * As it is a discretionary administrative body, and not a legislative body, it must act in making a variance in conformity with general rules of conduct prescribed for it by the state legislature or the council. If the board tries to legislate, its doings are void. It can only pass on applications for permits. Moreover as no two applications are precisely alike, each should be acted on separately. Blanket resolutions by boards of appeals, stating what variances they will make, are always futile. * * * *

* * * * * * * * *

"* * * Where the literal enforcement of the regulation will result in practical difficulty or unnecessary hardship to the applicant, the board of appeals in most states can make a variance in his favor and direct a permit. The scope of the board's powers in making such a variance is not unlimited but must accord with the spirit of the ordinance.

* * * * * * * * *

"The practical difficulty and unnecessary hardship must inhere in the land sought to be built upon. The needs of the surrounding lands or houses do not constitute a basis for the variance. The New York Board of Appeals granted a variance for several stores under a proposed apartment house on the ground that there were no stores near, that the surrounding homes needed a business center, and that it was a hardship to deprive them of it. Plainly this was no basis for a variance. Only the local legislative body could change the map and allow a new business center. It was a legislative matter and not a situation for a variance permit.

* * * * * * * * *

"The imposition of conditions often makes a variance lawful that would otherwise be unlawful. No variance is lawful which does precisely what a change of map would accomplish. For instance, a variance permit in a residence district is unlawful if it allows the building to be used for any purpose for which it might be used if in a business district. It would be contrary to the spirit and purpose of the ordinance. To be lawful it must go no further than the need for it reasonably requires. * * * *

* * * * * * * * *

"The board of appeals is not a legislative body. Courts have called it an administrative or quasi-judicial body. It cannot make laws. Its main function is to make variance permits in exceptional cases, subject to court review. In the exercise of this discretion, however, the board of appeals is not left free to make any determinations whatever that it may prefer. It must comply with rules of conduct prescribed by the state legislature. or by the local legislature acting under a direction or permission from the state legislature. * * * * *"

In 1924, Herbert Hoover, then Secretary of Commerce, issued the so-called Standard State Zoning Enabling Act, under which municipalities might adopt zoning regulations. This form advised the use of practical difficulty and unnecessary hardship as the rule for boards of appeals. Referring to this Act, Mr. Bassett wrote:

"Following the publication of the Standard Act this rule of conduct for zoning boards of appeals was adopted throughout the country. With the

exception of the courts of Illinois and Maryland it has been considered adequate in all states where it has been passed upon. Nevertheless boards of appeals have frequently failed to recognize the binding force of the rule, and quite regardless of its proper scope have issued variance permits in cases where they thought that little or no harm was done thereby or where they thought they were doing substantial justice. Courts have repeatedly pointed out that applications for variance permits must be decided according to the rules, and that the board of appeals, inasmuch as it is not a legislative body, is not at liberty to decide what is best for the individual or for the community."

As a means of delineating the extent of the power of the Board of Appeals under a very broad practical difficulty and unnecessary hardship statute, Bassett quoted a part of the decision in **People ex rel. Cockcraft v. Miller**, 187 App. Div. 704, 127 N. E. 919:

"* * * Apparently the board's contention is that this section gives them the power to do whatever they think is right regardless of the provisions of the statute. But it does not grant any such power. The board cannot wholly disregard the provisions of the statute or of the regulations. It can merely 'vary' them to do 'substantial justice' when the 'strict letter' of the provisions would work hardships. * * * * *"

Yours very truly,

A. A. CARMICHAEL
Attorney General.

October 5, 1950

Hon. Phillip J. Hamm
Director of Conservation
Capitol

State Lands—Deeds—Department of Conservation.

1. Where a true "Chardavoyne patent" has been issued by the State, the State has lost its interest in the property described therein by virtue of the provisions of Title 7, Sections 388 and 389, and Title 47, Section 61, Code of Alabama 1940.

2. The issuance of a quitclaim deed or another patent is not necessary to perfect title, however, when the records are incomplete the Director of Conservation may cause a quitclaim deed to be issued to the present owner of the property in question.

Opinion by Assistant Attorney General Halsey.

Dear Sir:

Your request for an official opinion bearing date of June 29, 1950, is as follows:

"By virtue of the authority contained in Title 8, Section 232 of the 1940 Code of Alabama, the Department of Conservation is empowered to have complete management of and supervision over swamp and overflowed

lands. Under Title 8, Section 248, 1940 Code, claims of title to swamp and overflowed lands are to be investigated and the matter determined by the Department of Conservation.

"For quite some time, our Department has conducted an investigation into a claim involving the W½ of the SW¼, Section 18, Township 5 North, Range 2 West, Washington County. Our investigation disclosed the following facts:

"The records in the office of the Secretary of State show that the above described properly passed from the Federal Government to the State of Alabama as swamp and overflowed lands and that, subsequently, the property was transferred from the State to the Alabama Hospitals, as is provided for by law. No other transfer of the property or transaction concerning it, appears within the records of the Secretary of State.

"In Deed Book P, at page 274, in the office of the Judge of Probate of Washington County, a patent appears from the State of Alabama to the Mobile and Ohio Railroad Company which conveys the W½ of the W½ of Section 18, Township 5 North, Range 2 West, Washington County. This conveyance was signed in the name of Robert B. Lindsey, Governor of Alabama, by his Secretary, W. V. Chardavoyne. The records in the office of the Judge of Probate of Washington County showed no signs of having been tampered with, and in comparing the entry with other entries involving so-called Chardavoyne patents, it was similar in every respect with them.

"The case of Turner against Davis, 186 Alabama 77, acknowledges the soundness of the Act of the Alabama Legislature, 1911 General Acts, pages 192 and 193, which permits the tracing of title land to patents purporting to be signed by Governor Robert B. Lindsey by his secretary, W. V. Chardavoyne.

"The Abstract of Title, prepared and certified to by Deister, Ward and Witcher, Abstractors, shows that the Chardavoyne patent, above referred to, was issued at the City of Montgomery on the 20th day of February 1872, and recorded in the office of the Judge of Probate of Washington County on the 29th day of January, 1886.

"In view of the above facts, we would like to have your official opinion as to whether or not the State should, as a matter of right, issue to the present claimant of the land in question a quitclaim deed from the State of Alabama to clear his title of the cloud caused by the so-called Chardavoyne patent and the failure of the office of the Secretary of State to have any record of same.

"Your usual prompt attention in handling such matters will be deeply appreciated."

Assuming the patent under consideration to be true "Chardavoyne patent," it is my opinion that the State has lost its interest in the property described therein. I do not think it is necessary that the State issue another patent or a quitclaim deed to the property under consideration to perfect the title. However, in view of the fact that the records in the office of the Secretary of State do not show this patent, I see no objection to the State now executing a quitclaim deed covering the property under consideration to the present owner.

The formal validity and prima facie effect of state patents of the class here under consideration, known as the "Chardavoyne patents," have been affirmed and fully settled by the decisions of our Supreme Court. **State v. Mobile & O. R. Co.,** 201 Ala. 271, 78 So. 47; **State v. Mobile & O. R. Co.** 190 Ala. 409, 67 So. 286; **Turner v. Davis,** 186 Ala. 77, 64 So. 958; **Jordan v. McClure Lumber Co.,** 170 Ala. 289, 54 So. 415.

In the case of **Turner v. Davis,** supra, Act No. 191, General Acts 1911, page 192, was discussed and its validity upheld. This act had the effect of making conveyances such as the one under consideration, executed prior to February 2, 1879, or duly certified copies of the record thereof, admissible and prima facie evidence of any sale or transfer of lands therein recited and of the payment of the purchase money thereof. The 1911 Act was codified in the Code of Alabama 1923, as Sections 7676 and 7677, and now appears as Title 7, Sections 388 and 389, Code of Alabama 1940.

Your attention is also invited to Title 47, Section 61, Code of Alabama 1940, which provides as follows:

"Sec. 61. Titles ratified and confirmed.—All conveyances of land owned or claimed by the state made by the governor in the name of the state prior to August 17, 1924, are heeby ratified and confimed as valid conveyances of such lands to the purchasers or grantees thereof."

In view of the foregoing, it is my opinion that, under the authority of Title 8, Sections 232 and 248, Code of Alabama 1940, the Director of Conservation may cause a quitclaim deed to be issued to the present owner of the property under consideration, the State having lost all its interest therein.

Yours very truly,

A. A. CARMICHAEL
Attorney General.

October 5, 1950

Hon. Joe Foster
Tax Collector
Colbert County
Tuscumbia, Alabama

County Boards of Equalization—Tax Assessors—Tax Collectors.

When a tax assessment is reopened by the board of equalization, as provided in Title 51, Section 55, Code of Alabama 1940, upon satisfactory proof that the taxpayer did not receive notice of an increase in the valuation of his property, and upon a hearing the board changes the amount of the assessment, it is the duty of the tax assessor to enter such change on the tax return list and on the book (tax roll) furnished by him to the tax collector, under the provision of Title 51, Section 65, Code of Alabama 1940. Such changed amount is the amount of taxes to be collected by the tax collector on the property in question.

Opinion by Assistant Attorney General Arbuthnot.

Dear Sir:

Your request for an official opinion, bearing date of September 19, 1950, is as follows:

"I should like a ruling from you on the following facts and questions:

"Howell & Graves and A. L. Howell own certain lots in Muscle Shoals Center No. 8, Colbert County, Alabama. In 1949 A. L. Howell assessed and paid taxes on 58 lots in said subdivision at a value of $3.00 each. Howell & Graves assessed and paid taxes on 433 lots in said subdivision in 1949 at a value of $3.00 each. For the tax year 1950, the Colbert County Board of Equalization raised the taxes on said property owned by Howell & Graves and A. L. Howell to $20.00 each.

"On September 1, 1950, A. L. Howell and Howell & Graves filed an application or petition with the Colbert County Equalization Board which is set out verbatim hereinafter on said date the Colbert County Board of Equalization made an order on said petition or application as is hereinafter set out.

" 'Tuscumbia, Alabama.
September 1, 1950.

" 'To:
" 'Colbert County Equalization Board.

" 'Re: Muscle Shoals Center No. 8, Colbert County, Alabama. A. L. Howell Assessment, and Howell & Graves Assessment.

" 'Gentlemen:

" 'Section 55 of Title 51 of the 1940 Code of Alabama provides that the taxpayer shall have the right any time before the taxes become delinquent to appear before the County Board of Equalization and have the assessment of his property reopened, if satisfactory proof is made that the taxpayer or his agent did not receive in accordance with the terms of said Section 55 notice of any increase that might have been made in his taxes over the previous year.

" 'You gentlemen are thoroughly familiar with this matter and I respectfully request that your Board reopen this matter as you are legally authorized to do under said Section 55 of Title 51 of the 1940 Code.

" 'Respectfully submitted,

" 'SMITH & TOMPKINS

" 'By Jas. E. Smith, Jr.
Attorneys for Howell & Graves, and A. L. Howell.'

" 'On this the 1st day of September, 1950, the Colbert County Board of Equalization met and considered the above request and the Board being satisfied that under the provisions of Section 55 of Title 51 of the 1940 Code of Alabama, the assessment of Howell & Graves and A. L. Howell should be reopened as is provided for in said Section 55, and the said

Colbert County Board of Equalization hereby fixes the assessment on the property assessed by Howell & Graves and the property assessed by A. L. Howell in said Muscle Shoals Center No. 8 at $15.00 per lot, for the tax year beginning October 1, 1949, and ending October 1, 1950.

" 'Done this the 1st day of September, 1950.

" 'Charlie G. Morris,
Chairman, Colbert County
Board of Equalization.'

"The application or petition and order seem to be self-explanatory. A copy of said application or petition and order has been filed in my office as tax collector and also has been filed in the tax assessor's office of Colbert County, Alabama. At the time the same was filed in my office I had already received the tax assessor's abstract covering the assessments of Colbert County, Alabama, for the year 1950.

"I repectfully request an opinion as follows:

"(1) Am I authorized to collect taxes on the said lots of Howell & Graves and A. L. Howell for the year 1950 on the basis of $15.00 as ordered by the Colbert County Board of Equalization or should I collect taxes on the basis of $20.00 as formerly set up.

"(2) Am I authorized to change the value of said property in accordance with the order of the Colbert County Board of Equalization by setting the same up as an erroneous assessment or in some other manner, and if so, how."

In an opinion of this office found in Quarterly Report of Attorney General, Vol. 25, page 110, it was held that under the provisions of Title 51, Section 55, Code of Alabama 1940, when the board of equalization had increased the assessment of a taxpayer's property, and the taxpayer, upon satisfactory proof, showed to the board that he did not receive notice of such increase, the board has authority to reopen the assessment before the taxes become delinquent.

Under the provisions of Title 51, Section 93, Code of Alabama 1940, the tax collector is made secretary of the county board of equalization.

Title 51, Section 108, Code of Alabama 1940, is as follows:

"When the work of hearing objections against values fixed on taxable property shall have been completed by the board of equalization, the tax assessor shall enter upon the tax return lists the corrected values, if any changes have been made therein, which changed or altered value shall be the taxable value of the property or properties, unless an appeal is taken as herein provided, or unless otherwise ordered by the department of revenue."

Under the above section, it is the duty of the tax assessor, when the board of equalization has completed the work of hearing objections against values fixed on taxable property, to enter on the tax return lists the corrected value, if any changes have been made, and the changed or altered value is the taxtable value of the property or properties.

Under the provisions of Title 51, Section 65, Code of Alabama 1940, the tax assessor, after the book of assessments has been completed, must prepare and turn over to the tax collector on or before the 15th day of September a book (tax roll) showing the amount of taxes assessed against each taxpayer, the amount of taxes due, the address of the taxpayer, and other pertinent information. The tax collector has no authority to change the amount of taxes shown by said book to be due by a taxpayer. Quarterly Report of Attorney General, Vol. 32, page 37.

Inasmuch as under the provisions of Section 108, supra, it is the duty of the tax assessor to enter any changed or altered value made by the board upon hearing of objections, it is my conclusion that when the board reopens an assessment under the circumstances set out in your request and the assessment is changed, the tax assessor should enter such change on the tax return list. It then becomes the duty of the tax assessor to make the same change on the book (tax roll) furnished to the tax collector under the provisions of Section 65, supra. Such changed amount is the amount of taxes to be collected by the tax collector on the property in question.

In answer to your first inquiry, it is my opinion that after the tax collector has changed the tax book as indicated above, you should collect taxes on the basis of $15.00, the amount fixed by the board at the hearing.

In view of the conclusions reached above, a consideration of your second inquiry is not necessary.

The above conclusions are not in conflict with an opinion rendered to the tax assessor of Jefferson County under date of July 23, 1943, Quarterly Report of Attorney General, Vol. 32, page 37. That opinion deals with the hearing of objections by the board of equalization when revaluation of property is made by the board on order of the State Department of Revenue, as provided in Title 51, Section 134, Code of Alabama 1940.

In the case now under consideration, the revaluation was not made on an order of the State Department of Revenue, as provided in Section 134, supra, and, therefore, the procedure set out in Title 51, Section 135, Code of Alabama 1940, to be followed on hearing of objections, is not applicable.

Very truly yours,

A. A. CARMICHAEL
Attorney General.

October 10, 1950

Hon. J. C. Pattillo,
Clerk, Circuit Court,
Nineteenth Judicial Circuit,
Clanton, Alabama.

Recorder's Court — Appeals — Witnesses — Solicitor's — Municipalities — Costs and Fees — Fine and Forfeiture Fund — Opinions Overruled.

1. Cases appealed from recorder's court to circuit court should be docketed on the criminal side of the circuit court docket.

2. On appeal from the recorder's court to circuit court, the criminal schedule of fees, including witnesses fees, are applicable.

3. On appeal from the recorder's court to circuit court, solicitor's fees are not chargeable when the offense is a violation of a city ordinance, but same are chargeable on violation of State law.

4. A municipality is not liable for payment of costs is no conviction is obtained in the circuit court after an appeal from the recorder's court.

5. Costs accruing on appeal in the circuit court after a trial in the recorder's court are not payable from the fine and forfeiture fund, unless the case is a violation of a State law as distinguished from a municipal ordinance.

6. Quarterly Report of Attorney General, Vol. 35, page 115, overruled.

Opinion by Assistant Attorney General Sykes.

Dear Sir:

Your request for an official opinion bearing date of August 18, 1950, is as follows:

"There are conflicting opinions as to whether cases appealed from conviction in municipal courts are to be docketed, and I will appreciate very much your guidance on the following:

"1st. Is it proper to docket city appeal criminal cases on the civil or the criminal side of the docket in the Circuit Court?

"2nd. On an opinion from your office dated June 28, 1944, page 115, of Volume 35, you ruled that witness fees in such cases are to be handled as in civil cases. Would the general civil schedule of fees apply?

"3rd. Are solicitors fees payable by the defendant on conviction in the Circuit Court in such cases?

"4th. Is the city liable for any cost if no conviction is obtained,

"5th. Is any of this cost payable from the Fine and Forfeiture Fund of the County,

"I have several cases of this kind to be docketed and will appreciate your opinion at your earliest possible convenience."

In answer to your inquiry number 1, it is my opinion that appeals from the recorder's court (Title 37, Section 587, Code of Alabama 1940) should be docketed on the criminal side of the circuit court docket and not on the civil side.

In answer to your second inquiry, it is my opinion that the criminal schedule of fees, including witness fees, should apply in cases appealed from

the recorder's court to the circuit court, and the opinion referred to in your inquiry (Quarterly Report of Attorney General, Vol. 35, page 115, rendered June 28, 1944) should be overruled.

In answer to your third inquiry, you are advised that no solicitor's fees are chargeable in cases appealed from the recorder's court to the circuit court when the charge is for the violation of a city **ordinance.** Such fees are chargeable, however, if the crime charged is a misdemeanor against the laws of the State of Alabama but tried by the recorder under the provisions of Title 37, Section 594, Code of Alabama 1940, and appealed to the circuit court.

In answer to your fourth inquiry, the city is not liable for any costs in the circuit court in the event no conviction is obtained.

In answer to your fifth inquiry, it is my opinion that costs in the circuit court, after an appeal from a judgment in the recorder's court, cannot be paid from the fine and forfeiture fund of the county, unless the case on appeal is for the violation of a State law as distinguished from a municipal ordinance. See Title 37, Section 594, Code of Alabama 1940.

You will note that the recorder's court not only has jurisdiction of charges for the breach of city ordinances and by-laws (Title 37, Section 585, Code of Alabama 1940), but the recorder also has jurisdiction concurrently with the county court of all misdemeanors committed within the city. Title 37, Sections 594, 595, Code of Alabama 1940. Briefly, the recorder has jurisdiction not only of offenses against the city, but the recorder also has jurisdiction of offenses against the State of Alabama concurrently with the county court. It is proper to keep in mind the distinction between the two types of cases in answering your inquiry.

It has often been held that the violation of a municipal ordinance is not a crime or criminal offense against the State but only against the municipal corporation enacting the ordinance or regulation. **City of Mobile v. McCown Oil Co.,** 226 Ala. 688, 148 So. 402. For that reason, therefore, many of our statutory provisions having reference to criminal prosecutions have been held to be not applicable to violations of a municipal ordinance. So far as costs and fees are concerned, however, it is my opinion that generally speaking those schedules applicable to criminal cases should apply when the city case is on appeal in the circuit court and not the civil schedule of fees. Plainly, the laws establishing the recorder's courts (Title 37, Section 482, et seq., Code of Alabama 1940) contemplate that there be costs taxed in the circuit court after an appeal from the recorder's court. See especially Title 37, Section 588, Code of Alabama 1940, wherein the payment of costs is referred to. In my judgment, the legislature, in referring to such costs in the circuit court on appeal from the recorder's court, had in mind the usual schedule of fees for officers of the circuit court and witnesses in criminal cases. So far as the circuit court is concerned, the case appealed from the recorder's court is tried de novo. Whether the proceeding in the circuit court are called in some of our cases quasi-criminal or otherwise, the procedure and service required of officers of the court and witnesses are more related to a criminal prosecution than a civil action. **Spann v. Town of Hartford,** 23 Ala. App. 17, 21 So. 436, cert. den. 219 Ala. 127, 121 So. 437. The proceeding are begun by affidavit and information, writs of arrest are issued, subpoenas are issued, and a jury trial is held. The verdict and judgment include fines and imprisonment. It is my opinion, therefore, that the criminal schedule of fees for the officers of the circuit court and the witnesses are more applicable than those schedules for civil actions. You are advised, therefore, that you should refer to the criminal schedule for assessing fees, including witness

fees. Consequently, it is necessary for us to overrule an opinion of this office holding otherwise appearing in Quarterly Report of Attorney General, Vol. 35, page 115, rendered June 28, 1944.

For the same reasons as outlined above, it is my opinion that city appeal cases should be docketed on the criminal side of the circuit court. In my opinion such appeals partake more of the nature of criminal proceedings than civil proceedings.

Solcitor's fees are not chargeable in the circuit court when a municipal ordinance has been violated, but solicitor's fees are chargeable when the case is a misdemeanor in violation of a State law. Biennial Report of Attorney General, 1920-22, page 178. I have already called your attention to the two types of cases reaching the circuit court on appeal from the recorder's court. One type is for violation of a city ordinance, and the style would be City of Clanton v. John Doe. The other type would be styled State of Alabama v. John Doe. It is not the duty of the solicitor to prosecute for the State in the circuit court when a municipal ordinance violation is involved, and since it is not his duty to perform services, no solicitor's fees could be charged. Biennial Report of Attorney General, 1920-22, page 178. When, however, the city case on appeal in the circuit court is a misdemeanor and therefore a violation of the laws of the State of Alabama (Title 37, Section 594, Code of Alabama 1940), it is the solicitor's duty to prosecute the case in the circuit court, and the usual solicitor's fee for a conviction in the misdemeanor case should be charged. Biennial Report of Attorney General, 1920-22, page 178.

It has been held that there is no law providing for the payment of costs by the city if there is no conviction in the circuit court after an appeal from the recorder's court. Biennial Report of Attorney General, 1920-22, page 179; Quarterly Report of Attorney General, Vol. 25, page 45, 48. Quarterly Report of Attorney General, Vol. 50, pages 11, 13.

You are further advised that in the event of an acquittal or the case being nol prossed in the circuit court after an appeal from the recorder's court, costs may be paid from the fine and forfeiture fund of the county only in the event that the case is a State case as distinguished from a violation of a municipal ordinance. Biennial Report of Attorney General, 1920-22, page 177, 181; Quarterly Report of Attorney General, Vol. 25, page 45, 47.

Very truly yours,

A. A. CARMICHAEL
Attorney General.

October 11, 1950

Hon. Bankhead Bates, Director
Department of Public Safety
C A P I T O L

Motor Vehicles—Highways and Highway Department.

1. Title 36, Section 94, Code of Alabama 1940, as amended by Act No. 607, General and Local Acts 1949, page 939, exempts overlength vehicles from obtaining a special permit under Title 36, Section 91, Code of Alabama 1940, only while said vehicle is actually transporting certain specified commodities.

2. After such a vehicle has deposited an exempted load, a special permit is required on the return trip if the vehicle is traveling empty or is carrying a non-exempted load.

Opinion by Assistant Attorney General Screws.

Dear Sir:

Your request for an official opinion, bearing date of August 31, 1950, is as follows:

"Title 36, Section 89 et seq., Code of Alabama 1940, makes it unlawful for any person to drive or move on any highway in this state any vehicle or vehicles of a size or weight except in accordance with the provisions for width, length, height and weight as are specified in said Section 89.

"Section 90 and Section 94, as last amended, (see Pocket Part, page 144) provide for certain exemptions from the weight, length, etc., requirements under Section 89. Section 94, as amended, reads in this respect, as follows:

" 'There shall be exempt from the provisions of this article as to length loads of poles, logs, lumber, structural steel, piping and timber, and vehicles transporting same.'

"The Department of Public Safety has recently been confronted with certain cases where trucks exceeding the length designated under Section 89 have left points in the State of Alabama hauling structural steel or other materials which are exempt under Section 94, as amended, and have hauled these materials to points in Georgia and other states. There would appear to be no question that these trucks hauling such exempted materials would be by Section 94, as amended, excluded from the length requirements under Section 89, so long as they were hauling the exempt materials.

"However, the difficulty arises when these trucks make their return trip to Alabama. Often on such return trips through Alabama and to their point of origin in Alabama the trucks are empty. At other times it appears that they haul on the return trips commodities which are not exempted from said length requirements, such as rolls of paper, etc., although they did haul exempted materials when they made the trip out of Alabama.

"In view of the foregoing, and in order that the law may be properly enforced, I request your official opinion, as follows:

"1. When an over-length vehicle leaves Alabama hauling materials which are exempted under Title 36, Section 94, as amended, can it return to its point of origin in Alabama empty without violating the length provisions as are set out in Section 89 of the same Title?

"2. When an over-length vehicle leaves Alabama hauling material which is exempted under Title 36, Section 94, as amended, can it return to its point of origin in Alabama without violating the law, if it hauls on said return trip a material which is not exempted under Section 94, supra?

"Your usual prompt attention is requested in rendering this opinion, in that at least two cases are now pending where these questions have arisen."

I am of the opinion that both of your inquiries should be answered in the negative.

Title 36, Chapter 3, Article 2 (Sections 89-94), Code of Alabama 1940, as amended in part, provides regulations as to size and weight of motor vehicles and loads. Section 91 authorizes the Director of the Highway Department to issue special permits in isolated cases for movement of oversize, overweight or overlength commodities and vehicles.

Section 94, at last amended by Act No. 607, General and Local Acts 1949, page 939, reads as follows:

"There shall be **exempt** from the provisions of this article as to **length** loads of poles, logs, lumber, structural steel, piping and timber, and **vehicles transporting same.**" (Emphasis supplied.)

The 1949 amendment, supra, added the words, "and vehicles transporting same." Prior thereto said section was, on September 7, 1948, construed as exempting only the load. See Quarterly Report of Attorney General, Volume 52, page 206. The 1949 amendment also exempted the vehicle transporting an exempted load. It will be noted that the addition of the 1949 amendment was confined to "vehicles transporting same," which referred to transporting the exempted load.

Section 94, supra, as amended, expressly limits the exemption to loads of poles, logs, lumber, structural steel, piping and timber, and vehicles while transporting same. The statute makes no provision for the exemption of an overlength vehicle traveling without a load or transporting other commodities. I am of the opinion that unless the load consists of poles, logs, lumber, structural steel, piping or timber, neither the load nor the vehicle is exempt. By traveling without a load, or by loading and transporting commodities other than those enumerated in Section 94, supra, the trucker forfeits his exemption, even though he is returning to his point of origin after having completed an outward haul of exempted commodities. Hence, it is my opinion that either of such trips with an overlength vehicle must move under special permit, as provided for by Title 36, Section 91, Code of Alabama 1940.

While the advantages of traveiling loaded in each direction can be cited in support of a broader exemption, no support therefor can be found within the words of the statute. As pointed out by Mr. Chief Justice Gardner in **Holt v. Long,** 234 Ala. 369, 174 So. 759, "We can only learn what the Legislature intended by what it has said, and have no right 'to stray into the mazes of conjecture or search for an imaginary purpose.' " Being in derogation of the size and weight limitations prescribed by Title 36, Section 89, Code of Alabama 1940, as amended, Section 94, supra, must be strictly construed. **Reaves v. State,** 121 Tex. Cr. App. 488, 30 S. W. 2d 286.

Very truly yours,

A. A. CARMICHAEL
Attorney General.

October 13, 1950

Hon. G. W. Howard
Judge of Probate
Elmore County
Wetumpka, Alabama

Elmore County—Loans in Anticipation of Taxes.

1. Title 12, Section 125, Code of Alabama 1940, has no application to Elmore County.

2. The borrowing limit on moneys in anticipation of taxes insofar as Elmore County is concerned is governed by Act No. 25, Local Acts 1936, Extra Session, page 20.

Opinion by Assistant Attorney General McQueen.

Dear Sir:

Your request for an official opinion, bearing date of August 14, 1950, is as follows:

"I would like to have your opinion regarding the limitations on the amount Elmore County can borrow in anticipation of taxes as provided by Title 12, Sections 124-128 of the Code of 1940.

"You will note that Title 12, Section 125, provides that no loan shall be greater than one-half of the **income** of the county for the preceding year and that after the adoption of the Code the borrowing limit shall be reduced five per cent (5%) each year for twenty (20) years.

"Section 6777 of the Code of 1923 provides that the amount borrowed shall not be more than one-half the income from **taxation** for the preceeding year, while the present law provides that the amount borrowed shall not exceed one-half the **income** of the County for the preceding year. It would appear, and I venture the suggestion to you, that this change in the law evidences an intention on the part of the legislature to increase the borrowing limit from one-half the amount received from taxation to one-half of the income of the county, which would include, of course, not only income from taxation, but income **from other sources.**

"I would like also to direct your attention to a local act relating to Elmore County, which is found in Local Acts, Extra Session 1936, page 20. The purpose of securing the passage of this act was to relieve Elmore County of the limitations imposed by the Financial Control Act of 1935, Acts 1935, page 803.

"I would like therefore for you to give me your opinion on the following specific questions:

"(1) In determining the limitation imposed by Title 12, Section 125, Code of 1940, what items of income of the county would be considered? Would this income include not only the five mill ad valorem tax for general purposes, and the special tax of two and one-half mills for roads, bridges, and public buildings, but would it also include license taxes on

business and professions, the county's part of the automobile license tax for tags, the county's part of privilege tax on mortgages, deeds, sales tax, and money turned over to the county derived from the alcoholic beverage tax and other sources of income of the county from whatever sources derived? Would it also include the county's share of gasoline tax collected by the State and distributed to the counties?

"(2) Inasmuch as Title 12, Section 125 of the Code of 1940 has been in force for ten years, does this mean that the county can now legally borrow not more than one-half of what it could borrow when this section went into effect and that therefore the county cannot borrow at the present time more than one-fourth of the income of the county for the preceding year, determined as you may answer the last preceding question?

"(3) In view of the local act hereinabove referred to, may the county still borrow up to one-half of the income from taxation for the preceding year notwithstanding Title 12, Section 125 of the present Code, or did this section operate to repeal the said local act?

"The county has made plans for extensive paving projects to be completed this year and a prompt reply to this request for your opinion would be greatly appreciated."

In my opinion, it is not necessary to consider the meaning of the word "income" as used in Section 125, Title 12, Code of Alabama 1940, as outlined in your request, for the reason that Section 125, supra, has no application to Elmore County.

In 1935, the Legislature passed what is commonly referred to as the County Financial Control Act, this act being Act No. 379, General Acts 1935, page 803. The main purpose of this act was to put each of the several counties of the State on a pay-as-you-go basis.

The Legislature, in Extraordinary Session of 1936, realizing the exceptional financial condition of Elmore County, saw fit to pass Act No. 21, Local Acts 1936, page 20, which said act conferred upon the Commissioners Court of Elmore County the authority to borrow money in anticipation of taxes, and provied for the issuance of warrants or certificates of indebtedness evidencing such loans, and placed a limit on the amount of money which Elmore County could borrow under the provisions thereof. This act was passed to exempt Elmore County from the provisions of Section 11 of the so-called County Financial Control Act, this being the only section of the act limiting the amount of money a county may borrow in anticipation of taxes.

It is to be specifically noted that this act was passed and approved about one year after the adoption of the County Financial Control Act.

We now come to the question as to whether or not Section 125, supra, in effect, repealed Local Act No. 21, supra. In my opinion, this local act has not been repealed by the inclusion of Section 125 in the 1940 Code.

Your attention is specifically directed to Title 1, Section 9, Code of Alabama 1940, which reads in pertinent part as follows:

"§ 9. . . . . Local, private, or special statutes, and those public laws not of general and permanent nature, and those relating to the swamp and overflowed lands, and those relating to the public debt, and appropria-

tions, and any act submitting an amendment to the Constitution, and any act to be effective upon the adoption of such an amendment to the Constitution, are not repealed by this Code . . . . . "

It expressly appears from the above-quoted portion of Section 9, supra, that local acts were not repealed by the adoption of the Code of Alabama 1940.

It thus appears that Local Act No. 21, supra, is still in force and effect, and if Elmore County desires to borrow any money in anticipation of taxes, it should be guided by the provisions of said local act and not by the provisions of Section 125, supra.

Very truly yours,

A. A. CARMICHAEL
Attorney General.

October 13, 1950

Hon. E. S. Tunstall
Tax Assessor
Baldwin County
Bay Minette, Alabama

Motor Vehicles—Tax Assessors—Ad Valorem Taxes—Assessments.

It is not the duty of a tax assessor, in assessing a motor vehicle for ad valorem taxation, to determine the classification of such motor vehicle for license and registration fee purposes.

Opinion by Assistant Attorney General McQueen.

Dear Sir:

Your request for an official opinion, dated September 27, 1950, as as follows:

"Title 51, Section 704 of the 1940 Code of Alabama sets out the duties of the Tax Assessor in connection with the assessment and collection of ad valorem taxes on automobiles.

"Title 51, Section 393 et seq. provide various classifications for private cars and other motor vehicles by which the amount due for license due thereon are determined, which licenses, as you know, are issued by the Judge of Probate.

"I wish you would give me an official opinion advising me if there is any duty on me, as Tax Assessor, to determine the classification of automobiles in the manner and for the purposes provided by Title 51, Sections 393 et seq. of the Code."

The answer to your question is in the negative.

Title 51, Section 693, Code of Alabama 1940, provides that the license and registration fees to be charged on automobiles and motor vehicles kept for private use shall be determined by the weight of such motor vehicles.

Title 51, Section 704, Code of Alabama 1940, as amended by Act No. 314, General Acts 1945, page 504, provides that for the purpose of aiding in preventing the escape of taxation on motor vehicles, the probate judge shall not issue a license to operate such motor vehicle until the person applying therefor surrenders to him a receipt of the tax collector showing that the ad valorem tax for the preceding year has been paid on such motor vehicle.

The only duty imposed on tax assessors in regard to the ad valorem taxation of motor vehicles is to see that such motor vehicles are assessed at sixty per cent of the fair and reasonable market value of the same.

As pointed out above, the classification for license on motor vehicles is based on weight, and the ad valorem taxation on motor vehicles is based on sixty per cent of the fair and reasonable market value of such motor vehicles. I do not see how the tax assessor could possibly determine the value of the motor vehicle by ascertaining the weight thereof. For example, a 1940 Buick would be classified as taking a "D" license tag; on the other hand, a 1950 Ford would take a "C" classification tag. The 1940 Buick, of course, being a heaver car, it would weigh more than the 1950 Ford. Yet, sixty per cent of the fair and reasonable market value would be materially different. The Ford being a lighter and more recent model would have a higher market value than the 1940 Buick and the ad valorem tax on the Ford would be higher.

It is the duty and only the duty, of the tax assessor in assessing motor vehicles for ad valorem taxation to see that the same are assessed at sixty per cent of the fair and reasonable market value thereof. On the other hand, it is the duty of the probate judge to determine the classification of the automobiles by weight as provided by Section 693, supra, so as to determine what license and registration fee is due upon such motor vehicle.

In conclusion, I do not see how the tax assessor could place a fair and reasonable market value on a motor vehicle by determining the weight or classification thereof. The only way that this fair and reasonable market value can be determined is by determining the value of the motor vehicle if it were put up for sale. It can readily be seen that the weight of such motor vehicle would have nothing whatsoever to do with its fair and reasonable market value.

Very truly yours,

A. A. CARMICHAEL
Attorney General.

October 13, 1950

Hon. R. E. Bowdon, Jr.
Mayor, Town of Calera
Shelby County
Calera, Alabama

Municipalities—Taxes—Tobacco.

Tobacco tax levied by ordinance of Town of Calera upon tobacco sold, stored or delivered within the police jurisdiction of Calera held valid.

Said tax must be levied as a license tax pursuant to the exercise of the police power and be designed for the purposes of regulation rather than revenue.

Opinion by Assistant Attorney General Halsey.

Dear Sir:

Your request for an official opinion, bearing date of May 26, 1950, is as follows:

"We respectfully request that you render us an opinion as to whether or not the Town of Calera can legally levy a tobacco tax on cigarettes sold, stored or delivered in our police jurisdiction.

"The Town of Calera passed and adopted a Tobacco Tax Levy Ordinance, effective May 1st, 1950, levying a tax of 2 cents for each 20 cigarettes sold, stored or delivered in the Town of Calera and 1 cent per 20 cigarettes sold, stored or delivered in its police jurisdiction. Dealers in police jurisdiction are contesting this levy in police jurisdiction, their Attorney claiming municipalities do not have authority to levy the tax in police jurisdiction."

The following statutes control here. Title 37, Section 733, Code of Alabama 1940, as amended, reads, in pertinent part:

"Section 733. Licenses, general. — Any city or town within the State of Alabama may fix and collect licenses for any business, trade or profession done within the police jurisdiction of such city or town but outside the corporate limits thereof; provided, however, that the amount of such licenses shall not be more than one-half the amount charged and collected as a license for like business, trade or profession done within the corporate limits of such city or town, fees and penalties excluded."

Title 37, Section 455, Code of Alabama 1940, reads:

"Section 455. Power to adopt and enforce ordinances. — Municipal corporations may, from time to time, adopt ordinances and resolutions not inconsistent with the laws of the state, to carry into effect or discharge the powers and duties conferred by this title, and provide for the safety, preserve the health, promote the prosperity, improve the morals, order, comfort, and convenience of the inhabitants of the municipality, and en-

force obedience to such ordinances by fine not exceeding one hundred dollars, and by imprisonment or hard labor not exceeding six months, one or both."

Pursuant to the foregoing statutes, if your ordinances is to be declared valid and thus validate the tax levy in question, it is essential that it be effective as a measure of the police power and that it be directed toward regulation of business engaged in selling, storage and delivering of tobacco in the police jurisdiction of Calera, and not towards obtaining revenue.

In support of this contention is the language in C. J. S. Section 127, at page 273. I quote:

"The police power of a municipal corporation must be distinguished from its taxing power. The object of an exercise of the police power must always be regulation, and not the raising of revenue, and hence, the restrictions of the taxing power do not apply. In determining whether an ordinance has for its purpose regulation or revenue, the substance, and not merely the form must be considered and the fact that it purports to be a revenue or regulatory measure is not conclusive, although it is persuasive, but, where the declared purpose of its exercise is regulatory the court will not go behind the legislative declaration in the absence of anything to show that the declaration is a sham and the real purpose is to raise revenue."

The problem is discussed in the case of the **City of Andalusia v. Fletcher,** 240 Ala. 110, 198 So. 64, where an ordinance had been passed exacting a tax of three-fourths of one cent on each gallon of gasoline sold without the corporate limits of the City of Andalusia but within its police jurisdiction. The ordinance there assailed was passed by the city pursuant to the provisions of the Act of September 6, 1927, which appears as Title 37, Section 733, Code of Alabama 1940, as amended, authorizing cities and towns to fix and collect licenses for businesses conducted without the corporate limits but within police jurisdiction thereof:

"(1, 2) The ordinance of the City, offered in evidence by plaintiff, fixed the tax at three-fourths of 1 cent for each gallon of gasoline sold. Presumably it was passed in the valid exercise of the police power (Walden v. City of Montgomery, 214 Ala. 409, 108 So. 231) and not as a source of revenue (Alabama Power Co. v. City of Carbon Hill, 234 Ala. 489, 175 So. 289), and the action of the municipal body in fixing the amount of the fee will not be disturbed by the Court unless it appears there was a manifest abuse of that power."

The premises considered, and in reliance on the presumption that your ordinance is effectuated as an exercise of the police power, my answer to your inquiry is in the affirmative. However, if your ordinance is primarily directed toward obtaining revenue and not toward the exercise of the police power, the ordinance is invalid and the tax in question is illegal. **Alabama Gas Company v. City of Montgomery,** 249 Ala. 257, 30 So. 2d 651.

Very truly yours,

A. A. CARMICHAEL
Attorney General.

October 16, 1950

Hon. F. H. Norton
Judge of Probate
Cherokee County
Centre, Alabama

Fees for the Issuance of Licenses Pertaining to the Department of Conservation—Cherokee County.

Fees for the issuance of hunting, fishing and wholesale and retail fish-dealers licenses which are paid to the Judge of Probate of Cherokee County should be paid by him to the County Treasury. Fees for the issuance of fur-catchers licenses by the Judge of Probate of Cherokee County should be remitted to the State Department of Conservation together with the cost of the licenses.

Opinion by Assistant Attorney General Harris.

Dear Sir:

Your request for an official opinion, bearing date of June 5, 1950, is as follows:

"Local Act No. 162, approved June 17th, 1943, placed the Judge of Probate and other County officials on a salary basis. All legal charges, fees, costs, compensations and allowances heretofore or hereafter authorized to be collected by them or any one of them shall pay the same into the County Treasurer on the first Monday of each month thereafter.

"Title 8, Section 43 and Section 97 authorizes the Judge of Probate to retain certain fees for issuing hunting and fishing license. This office being on a salary basis, I have retained these fees and paid into the County Treasury for credit to the County General Fund.

"State Examiners are now checking the records of my office and are demanding that I pay to the State Department of Conservation the 50c fee for issuing fur catcher License and the 25c fee for issuing Retail Fish Dealer license for all such licenses issued by me since I took office in January 1947. What I want to know is whether or not I should pay these fees into the County Treasury as I have been doing or pay the same to the Department of Conservation.

"I would appreciate you giving me your opinion at an early date in order that I might have same before the Examiners finish their examination of my office."

I am of the opinion that all such fees as mentioned in this request by the Judge of Probate of Cherokee County must be paid into the County Treasury, with the exception of those fees collected pursuant to Section 97, Title 8 of the 1940 Code of Alabama.

I quote the three sections of the Code which pertain to the subject of the requested opinion as follows:

"Title 8, Section 43: FEES OF ISSUING OFFICERS; DISPOSITION OF REMAINDER; REPORTS. — Judges of probate and other persons authorized and designated to issue licenses shall retain out of the money received for each license issued the following amounts: County hunting and state hunting licenses, non-resident hunting licenses, resident and non-resident fishing licenses, fifteen cents each, which fees shall cover services required by the provisions of this chapter, and shall remit the balance to the department on the first of each month, which balance shall be covered into the treasury to the credit of the game, fish and seafoods fund of the department of conservation; and said judges of probate and all other duly authorized and designated persons shall report to the department on the first day of each month the number and kind of licenses issued and the name and post office address of the person or persons to whom issued, giving opposite each name the serial number of the license so issued and the amount of money remitted. Provided, however, that all such fees collected by any probate judge, license commissioner, or other official who is paid a salary for the performance of his duties shall be paid by him into the county treasury to the credit of the general fund, and the entire amount collected by the director shall be covered by him into the game, fish and seafoods fund of the department of conservation."

"Title 8, Section 171—(10): FEES OF ISSUING OFFICERS; DISPOSITION OF REMAINDER; REPORTS.—Judges of probate and other persons authorized and designated to issue licenses shall retain out of the money received for each license issued under the provisions of this article twenty-five cents for each license issued, which amount shall cover services required by the provisions of this article, and shall remit the balance to the director of the department of conservation on the first of each month. Said judges of probate and all other duly authorized and designated persons shall report to the director of the department of conservation of the State of Alabama on the first day of each month the number and kind of license issued under this article and the name and post office address of the person or persons to whom issued giving opposite each name the serial number of the license so issued, and the amount of money remitted. Provided, however, that if any such license is issued by the director of conservation or by any probate judge or other officer who is paid a salary for the performance of his duties as such officer, he shall be required to remit the entire amount collected to the director of conservation, except the amount charged by the issuing officer for the issuance of such license and this amount shall be remitted to the treasurer of the county in which said license was paid."

"Title 8, Section 97: FUNDS FROM SALE OF FUR LICENSES.—Judges of probate and other persons authorized and designated to issue licenses, stamps or tags provided in the preceding section shall retain out of the license fee for the sum of fifty cents, which shall cover the services required for issuing and reporting the sale of said licenses, stamps or tags, and shall remit the balance to the director on the first of each month, which balance shall be deposited with the treasury to the credit of the conservation fund; provided, however, that judges of probate, license commissioners or other persons authorized to issue hunting, fishing and fur licenses who are paid a salary for their services as a public official, shall remit to the director the entire amount of revenue derived each month from the sale of fur licenses, stamps, or tags. Each person authorized to issue fur licenses, stamps or tags shall make a full and complete report on the first day of each month to the director of the number of licenses and the number of stamps or tags of each class issued and the name and post office address of the person or persons to whom issued, giving opposite each name the serial number of the license issued and the num-

ber of each kind of stamp or tag issued to each licensee, so issued, and the amount of money remitted therefor."

The licenses referred to in Title 8, Section 43, supra, relate to hunting and fishing licenses. Those referred to in Title 8, Section 97, supra, relate to fur-catchers licenses. The licenses referred to in Title 8, Section 171 (10), supra, pertain to wholesale and retail fish-dealers licenses.

Local Act No. 162, approved June 17, 1943, placed the Judge of Probate and other county officials of Cherokee County on a salary basis. All legal charges, fees, cost, compensation and allowances heretofore or hereafter authorized to be collected by them or anyone of them shall be paid into the county treasury on the first Monday of each month thereafter.

The Constitution of 1901 provides in Article 4, Section 105, as follows:

"Section 105: NO SPECIAL, PRIVATE, OR LOCAL LAW, EXCEPT A LAW FIXING THE TIME OF HOLDING COURTS, SHALL BE ENACTED IN ANY CASE WHICH IS PROVIDED FOR BY A GENERAL LAW, or when the relief sought can be given by any court of this state; and the courts, and not the legislature, shall judge as to whether the matter of said law is provided for by a general law, and as to whether the relief sought can be given by any court; nor shall the legislature indirectly enact any such special, private, or local law by the partial repeal of a general law."

In the light of Article 4, Section 105 of the Constitution, Local Act No. 162, approved June 17, 1943, is void as to the disposition of fees, on such licenses as set out above, in that there are general laws, as set out above, which govern in such cases.

Title 8, Section 43, as amended and Section 171 (10) are specific in their wording and they can only be interpreted to mean that such fees as enumerated therein shall revert to the county general fund.

The wording in Section 97 of Title 8 is equally clear in the manner the fees enumerated therein shall be disposed of. Under this section when a Probate Judge, on a fee system, is placed on a salary basis such fees charged for the issuance of such license shall be paid to the department of conservation.

Therefore the general laws governing these fees being clear and specific as to the disposition of same, the local law cannot govern, but the disposition of the fees must be governed by the general law on the same subject as provided for by Article 4, Section 105 of the Constitution of 1901.

Very truly yours,

A. A. CARMICHAEL
Attorney General.

October 22, 1950

Hon. T. H. Thompson
Tax Collector
Tallapoosa County
Dadeville, Alabama

Examiner of Accounts—Taxation—Tax Collectors—Interest.

1. Interest collected on delinquent taxes is properly apportionable only to such delinquent taxes.

2. Examiner of Accounts may prescribe other reasonably accurate method of apportionment of interest on delinquent taxes where amount of such taxes cannot be practicably determined.

Opinion by Assistant Attorney General Amos.

Dear Sir:

Your request for an official opinion bearing date of August 14, 1950, is as follows:

"I am asking you to give me an official opinion in regards to the distribution of interest collected as provided for by Title 51, Section 196, Code of 1940. The quoted statute makes it mandatory on the part of the Tax Collector to add interest at the rate of 6% on delinquent taxes. Title 51, Section 23, Code of 1940, defines the delinquent date on unpaid taxes as being before January succeeding the beginning of a tax year which is the 1st day of October 1949 for the year involved; therefore December 31, 1949, would be the last date that taxes could be paid without a charge being made by the Tax Collector for interest.

"As Tax Collector of Tallapoosa County, Alabama, I take the position that interest is applicable on all uncollected taxes January 1, 1950., and should be prorated accordingly. That is, the interest collected should be applied to each tax dollar, according to the tax levy, taking into consideration the date collected.

"In making my remittances to the various treasurers of funds, including the final settlement with the State Comptroller, for the State's part of taxes collected, I prorate the interest collected to delinquent taxes only, according to the amount collected for each levy.

"Recently the State Department of Examiners had an audit made of my records for the tax year 1949. The Examiner conducting the audit applied interest collected on delinquent taxes to my total tax collections of real and personal property for the period October 1, 1949, to the date included in the audit. The method used by the Examiner of Public Accounts in distributing interest collected on delinquent taxes resulted into over and under payments due the various fund. I insist that all agencies had been correctly paid before the redistribution made of the interest by the Examiner.

"Please give me an Official Opinion to the following question.

"Should interest collected by the Tax Collector pursuant to Title 51, Section 196, Code of 1940, be applied only to delinquent taxes collected subsequent to January 1, 1950, or should same be applied by the Tax Collector to the total collections made by the Tax Collector for the period October 1, 1949, to the date in which the audit made by the Examiner closed."

You are advised that the method employed by you in apportioning to the various funds interest collected on delinquent taxes, i. e., apportioning interest only to delinquent taxes collected on or after January 1 rather than to total collections on or after October 1, is proper.

It appears that through the use of a "cash book" you can accurately determine the delinquent taxes collected by you. We are informed by the office of the Examiner of Accounts that many tax collectors do not keep such books. Where this book is not kept it would be necessary to inspect each tax receipt to determine whether the tax payment represented by it was delinquent—a tremendous task. The Examiner of Accounts therefore finds it expedient to apportion interest on delinquent taxes to the entire amount of taxes collected from October 1. While this naturally gives a different result, the discrepancy is small, and I am of the opinion that the Examiner of Accounts may prescribe this method in appropriate cases under the provisions of Title 55, Section 156, Code of Alabama 1940, as amended by Act No. 194 General Acts 1945, page 318, which provides in part:

"Section 4. The Division of Examiners of Public Accounts of the Department of Finance, . . . is required to prepare such bookkeeping, accounting, and reporting systems, procedures, records, and forms as are necessary for the installation of uniform accounting and reporting in all the various Alabama county offices . . . the officers of which are charged with any duties relative to the receiving or disbursing of public or other funds and to transmit copies of these systems, procedures, records, and forms to such officers. **The Division may alter such uniform systems, procedures, records, and forms as and when it deems change advisable, and the Division may make any exception to them which it considers necessary for a particular county office . . .** " (Emphasis added.)

It is my conclusion that where, as in your case, the amount of delinquent taxes collected can be ascertained then the interest thereon should be apportioned only on such delinquent taxes. In the event the amount of delinquent taxes cannot be determined except by an examination of each tax receipt then the Examiner of Accounts may prescribe another method of apportionment of interest.

Very truly yours,

A. A. CARMICHAEL
Attorney General.

October 22, 1950

Hon. Ralph P. Eagerton,
Chief Examiner,
Department of Examiners of Public Accounts,
Montgomery 4, Alabama.

County Boards of Education — County Superintendents of Education — Schools.

1. The County Board of Education of Covington County has authority to grant a leave of absence without compensation, to the county superintendent of education during the school term under the facts considered.

2. When the county superintendent of education is granted a leave of absence, but is retained, without compensation, as a consultant (professional assistant), the board is without authority to pay him the fixed amount of $150.00 per month to defray his traveling expenses incurred in the performance of his duties as such consultant. However, the board does have authority to pay his actual traveling expenses necessary in the performance of his duties.

3. The county board of education may legally pay an acting superintendent of education less salary than that paid to the superintendent.

Opinion by Assistant Attorney General Arbuthnot.

Dear Sir:

Your request for an official opinion bearing date of September 22, 1950, is as follows:

"We are presently engaged in making an examination of the records of the County Board of Education of Covington County and several questions have arisen in connection therewith which affect the examination now in progress. I will appreciate it if you will render me an opinion on the following questions:

"Enclosed is a copy of a resolution of the Covington County Board of Education pertaining to the granting of a leave of absence of the Superintendent and the appointment of an Acting Superintendent.

"1. Does the County Board of Education have the legal authority to grant a leave of absence to the County Superintendent of Education during the school term?

"2. Can the County Board of Education legally authorize and pay from public school funds the amount of $150.00 per month to Honorable Hugh L. Taylor, as Consultant to the County Board of Education, to defray his travel expense in connection with his attendance at teachers meetings, trips to the Acting Superintendent's office and other necessary travel which may be incurred in this capacity?

"3. Can the Board of Education legally pay the Acting Superintendent less salary than that paid the Superintendent?

"In connection with this third inquiry attention is called to the attached resolution wherein the salary of the Superintendent was set for a two-year period beginning July 1, 1948.

"An answer to the above at your earliest convenience will be appreciated."

The County Superintendent of Education of Covington County is appointed by the County Board of Education of said county, there being no local law providing for his election by a direct vote of the qualified electors of the county. Title 52, Section 102, Code of Alabama 1940.

The general administration and supervision of the public schools of Covington County is vested in the County Board of Education of said county. Title 52, Section 62, Code of Alabama 1940.

In reference to your first inquiry, your attention is called to the case of **Baxter v. State, ex rel. Metcalf,** 243 Ala. 120, 9 So. 2d 119. In this case the court upheld the action of the county board of education of Etowah County in granting a leave of absence, without salary, to the duly elected and qualified superintendent of education of Etowah County to serve in the armed forces of the United States, and the appointment of an assistant superintendent of education to serve in the absence of the superintendent.

As stated in the minutes of the County Board of Education of Covington County attached to your request, the leave of absence was granted to the superintendent of education in the furtherance of a long established policy of encouraging the employees of the board to improve themselves professionally, in the belief that such policy was beneficial to the schools of Covington County and the cause of education generally.

While the reason for granting to the superintendent of education a leave of absence in the case under consideration is quite different from that in the **Baxter** case, supra, it is my conclusion that, in view of the holding of the **Baxter** case, the county board of education acted within its authority in granting a leave of absence to the superintendent of education of Covington County under the facts here considered.

It is therefore my opinion that your first inquiry should be answered in the affirmative.

Under the provisions of Title 52, Section 130, Code of Alabama 1940, the county board of education has authority to employ professional assistants "and may reimburse them for all actual traveling expenses necessary in the performance of their official duties."

According to the minutes of the Board of Education of Covington County, Mr Taylor (the duly elected and qualified superintendent of education) was retained as a consultant to the board and the acting county superintendent, and was to be paid $150.00 per month to defray his traveling expenses in connection with his attendance at teachers' meetings, his trips to the acting superintendent's office, and other necessary travel which he incurred in such capacity. It is my conclusion that under the provisions of Section 130, supra, the County Board of Education had authority to retain Mr. Taylor in the capacity of a consultant (professional assistant), and to pay him all actual traveling expenses necessary in the performance of his duties.

In answer to your second inquiry, it is my opinion that the County Board of Education of Covington County was without authority to pay Mr. Taylor the **fixed amount** of $150.00 per month to defray his traveling expenses. However, the board did have authority to pay his actual traveling expenses necessary in the performance of his duties as a consultant, and upon proper

proof, the board may now pay such actual necessary traveling expenses.

Title 52, Section 111, Code of Alabama 1940, as amended by Act No. 313, General Acts of 1943, page 300, provides in part as follows:

"* * * In counties in which the maximum salary of the county superintendent of education is not fixed by law, the county superintendent of education shall receive such compensation, including salary and travel expenses, as the county board of education shall direct. * * *"

It will be seen from the above section that the compensation of the County Superintendent of Education of Covington County is fixed by the County Board of Education, there being no maximum salary fixed by law for the County Superintendent of Education of said county. The fixing of such compensation is a matter of contract between the superintendent and the board, to which the acting superintendent appointed by the board is not a party. The compensation of the acting superintendent is also a matter of contract between him and the board. The fact that the board had contracted with the superintendent for his compensation to be fixed at a certain amount would not prevent the board from contracting for a different amount with the acting superintendent.

Answering your third inquiry, it is my opinion that the County Board of Education of Covington County may legally pay the acting superintendent of education of said county a less salary than that paid the superintendent.

Very truly yours,

A. A. CARMICHAEL
Attorney General.

October 26, 1950

Hon. Roy L. Wallace
Mayor-Elect
City of Gadsden
Etowah County
Gadsden, Alabama

Municipalities.

Under the provisions of Act No. 234, General Acts 1939, page 388, approved August 16, 1939, the Board of Commissioners may not transfer a department specifically placed by said act under the direct supervision of one member of the Board to the direct supervision of another member of the Board.

Opinion by Assistant Attorney General Johnson.

Dear Sir:

Your request for an official opinion, bearing date of September 25, 1950, is as follows:

"Your attention is invited to Title 62, Section 421, Code of Alabama 1940,

which section is applicable to the City of Gadsden, and especially to the following sentence found therein:

" 'The powers and duties pertaining to each of said departments shall be fixed by the Board of Commissioners, and altered from time to time by them as they may deem best.' "

"I respectfully request your official opinion as to whether or not, under this section, the Board of Commissioners of the City of Gadsden may transfer a department specifically placed by law under the direct supervision of one member of the Board to the direct supervision of another member of the Board, or whether said Board may only fix the powers and duties pertaining to each of said departments from time to time, but leaving each of said departments under the direct supervision of the member of the Board under whom said department is specifically placed by law.

"I realize that I have not yet assumed my duties as Chairman of the Board of Commissioners (Mayor) of the City of Gadsden, but I will assume these duties on Tuesday, October 3, 1950, at which time the two newly elected associate commissioners will also assume their duties. I contemplate that we will immediately need a proper construction of the section above referred to; and, for this reason, I will appreciate your giving me your official opinion on this matter as soon after October 3, 1950, as you can conveniently do so."

Act No. 234, General Acts 1939, page 388, approved August 16, 1939, established a commission form of government for the cities of Anniston and Gadsden. The sentence quoted in your request, while taken from a codification of the act, is identical with the language in said act.

Section 9 of said act is here quoted in full for better explanation:

"Section 9. Section 8 of the Act described in Section 1 hereof is amended to read as follows: '(a) The Chairman of the Board shall have direct supervision over the department of public affairs, public safety, public health, city buildings and property, shall be chairman of all meetings of the Board and shall have general supervision over all matters pertaining to the government of such city; (b) One associate member shall have supervision of the department of streets, parks, public improvements and public utilities; (c) One associate member shall have supervision over the department of finance and taxation, accounts and accounting, budget and appropriation. The powers and duties pertaining to each of said departments shall be fixed by the Board of Commissioners, and altered from time to time by them as they may deem best. Provided the administration of each department shall be under the supervision and control of the Board of Commissioners as a whole, and such Board shall be responsible therefor.' "

In Section 9, supra, the Legislature has divided the governing powers into three separate divisions, each headed by one of the three Commissioners it has assigned to each of the three several division's certain fields of supervision, authority and control and has set out specifically which departments of the city shall come within the direct supevision and control of each Commissioner.

Since the Legislature has denominated which departments of the city government shall be under the direct supervision and control of each commissioner, any change must be made by the Legislature.

The sentence quoted in our request, "The powers and duties pertaining to

each of said departments shall be fixed by the Board of Commissioners, and altered from time to time by them as they may deem best," has reference to powers and duties within said departments.

Within the title of Act No. 234, supra, is found the following language:

"AN ACT

"To . . . . fix the Duties, powers and Compensation of the Board of Commissioners - -, ..."

It is a familiar rule of statutory construction that though the title of an act cannot extend or restrain the positive language of the body of a statute, where the meaning is doubtful, it may be considered, and that the recitals in the title of an act are available aids to the removal of ambiguity or uncertainty in the enacting clause. **Jones v. Stokes,** 179 Ala. 579, 60 So. 280; **State v. Board of Revenue and Road Comm'rs.,** 202 Ala. 303, 80 So. 368. **Wages v. State,** 225 Ala. 2, 141 So. 707.

It is also worthy of note that the Legislature has divided the duties and responsibilities between the Commissioners on a related and logical basis, as follows:

A. Chairman of Board
(1) Public Affairs
Closely (2) Public Safety
Related (3) Public Health
(4) City Buildings and Property

B. Associate Member
(1) Department of Streets
Closely (2) Department of Parks
Related (3) Department of Public Improvements
(4) Department of Public Utilities

C. Associate Member
(1) Department of Finance and Taxation
Closely (2) Department of Accounts and Accounting
Related (3) Department of Budget and Organization

You are, therefore, advised that the Board of Commissioners may not transfer a department specifically placed by Act No. 234, supra, under the direct supervision of one member of the Board to the direct supervision of another member of the Board.

Very truly yours,

A. A. CARMICHAEL
Attorney General.

November 9, 1950

Hon. G. H. Wright, President
Board of Commissioners
City of Auburn
Lee County
Auburn, Alabama

Officers and Offices—Recorder's Court—Solicitors—Lee County.

A person may not hold office as County Solicitor for Lee County under the provisions of Act No. 220, Acts 1949, page 312, and continue to serve as a City Recorder, such constituting a violation of the terms of Section 280, Constitution of Alabama 1901.

Opinion by Assistant Attorney General Hardin.

Dear Sir:

Your request for an official opinion, bearing date of October 2, 1950, is as follows:

"The undersigned President of the Board of Commissioners of the City of Auburn, Alabama, requests your answer to the following question:

"May the person elected to the office of County Solicitor of Lee County, Alabama, under the provisions of Act Number 220 of the Legislature of Alabama, Regular Session, 1949, approved July 12, 1949 (Acts of Alabama, 1949, General Session, pp. 312-313) also serves as Recorder of the City of Auburn, Alabama, under the provisions of Sections 582-600, inclusive, of Title 37, Code of Alabama (1940)?

Your attention is especially invited to the provisions of Section 585 of Title 37 of the Code, wherein the Recorder is vested with the power of an ex officio justice of the peace; to the provisions of Sections 416-429, of Title 13 of the Code, relating to the criminal jurisdiction of ex officio justices of the peace; and to the provisions of Act Number 242 of the Legislature of Alabama, Regular Session, 1949, approved July 15, 1949 (Acts of Alabama, 1949, General Session, pp. 361-366).

"J. Sydney Cook, Esq., was nominated for the office of County Solicitor last spring, and it is contemplated that he will be elected in November and will take office in January. Meanwhile he has also been appointed City Recorder, to serve during the pleasure of the Board of Commissioners. My question is whether he may lawfully continue to serve as City Recorder after he has assumed his duties as County Solicitor.
"I should appreciate an early reply."

The Lee Ccunty Solicitor unquestionably holds an office of profit under the State. Under Section 3 of Act No. 220, Acts 1949, page 312, he must perform all the duties prescribed by law for deputy solicitors in inferior courts, in the circuit court, and before the grand jury. A deputy solicitor holds an office of profit. Quarterly Report of Attorney General, Volume 29, page 19. It is provided that the Lee County Solicitor also shall attend all sessions of the Court of Common Pleas of Lee County and do and perform all duties of a solicitor therein including representing the State at all preliminary hearings in the Court of Common Pleas of Lee County. In this capacity he exercises a portion of the State sovereignty. The solicitor receives an annual

salary of twenty-one hundred dollars. The fact that there are additional duties of a public nature imposed upon the Lee County Solicitor serves to reinforce the conclusion that he holds an office of profit.

You are advised that a City Recorder also holds an office of profit under the State. His duties and powers are defined in Title 37, Section 585, Code of Alabama 1940. In that section it is provided that:

"§ 585. Recorders, jurisdiction, powers and duties of. * * * Such recorder is especially vested with and may exercise in the city and within the police jurisdiction thereof, full jurisdiction in criminal and quasi criminal matters, and may impose the penalties prescribed by ordinance for the violation of ordinances and by-laws of the city, and shall have the power of an ex-officio justice of the peace, except in civil matters. * * * "

Under Section 594 of Title 37, a recorder has concurrent jurisdiction with the County Court or court of like jurisdiction as to misdemeanors committed within the city or town or within its police jurisdiction.

These powers, plus others set out in Title 37, show clearly that a recorder is invested with a portion of the sovereignty of the State. See Quarterly Report of Attorney General, Volume 44, page 28, and **In re Opinion of the Justices,** 47 So. 2d 591, 593 (Ala. 1950). A recorder has specified and independent statutory duties imposed upon him and he performs official functions of great importance. A recorder appointed under a commission form of government serves at the will of such body, for a compensation fixed by it. Title 37, Section 584, Code of Alabama 1940. His compensation is not **fixed** in the sense that the amount is set out in the statute—nevertheless he is an officer of the State. Fixed tenure and compensation, although persuasive that a position is an office, are no longer prerequisites. See **In re Opinion of the Justices,** supra, and Quarterly Report of Attorney General, Volume 32, pages 58, 59.

It is, therefore, my opinion that the holding of these two offices at one and the same time violates Section 280, Constitution of Alabama 1901.

There is an additional reason why the Lee County Solicitor could not properly serve as City Recorder at one and the same time. Section 3 of Act No. 220, supra, provides, in part:

"Section 3. * * * Neither he (the Solicitor) nor his partner shall represent or defend any defendant charged with a criminal offense of any kind or character in any court, state, county, municipal, or federal in this state. * * * "

In my opinion, the Legislature intended that the Lee County Solicitor should appear in criminal matters only in his capacity as a solicitor, thus clearly precluding his acting as a recorder who has criminal jursidiction.

Having determined that the positions of County Solicitor and City Recorder are offices of profit, the effect of the City Recorder's assuming the office and duties of the Solicitor in January will be to vacate automatically the office of City Recorder. See Quarterly Report of Attorney General, Volume 32, pages 58, 59, citing **State ex. rel. Camp. v. Herzberg,** 224 Ala. 636, 141, So. 553 (1932).

Yours very truly,

A. A. CARMICHAEL,
Attorney General

Nov. 10, 1950

Hon. Lee McCorkle, Sheriff
Colbert County
Tuscumbia Alabama

Sheriffs — Extradition — Payment of Fees.

Where a sheriff returns a person to this State charged with a felony, under proper extradition papers, the sheriff is entitled to his fees whether such person is tried and convicted or not.

Opinion by Assistant Attorney General McQueen.

Dear Sir:

Your request for an official opinion, bearing date of November 2, 1950, is as follows:

"On April 24, 25, and 26th, 1948, I went to Gary, Indiana, to get one Jessie Blackburn on a warrant issued by the Governor on a charge of 'Robbery.'

"I brought the said Jessie Blackburn back to jail in Colbert County. After being confined in jail for some time he became insane. He finally became so violent and was in such condition that by order of the Circuit Judge I carried him to the Hospital at Mt. Vernon on July 27th, 1948. It is my understanding that he is permanently insane.

"There is still the case pending against him on the Circuit Court Docket. What I would like to know is can I go ahead and file for my expenses in removing the said Jessie Blackburn from Gary, Indiana, to Colbert County, Alabama, which the state is supposed to pay."

In answer to your request, you are advised that, in my opinion, you may file a claim for your expenses, for removing the person mentioned in your request from Gary Indiana, with the proper State authorities, and the same should be paid regardless of the fact that this defendant has not been tried.

This office in an opinion, under date of March 25, 1939, Quarterly Report of Attorney General, Volume 14, page 247, held that if a sheriff makes application to the governor for extradition papers in the regular form and the governor grants the same and the fugitive is returned to this State under the warrant of the governor of the asylum state, then the expenses of returning the fugitive will be paid by the State, whether the defendant is convicted or not.

This office has also held that where a sheriff goes to a foreign state armed with proper extradition papers, and the governor of the foreign state refuses to return the criminal to Alabama, then in that event the sheriff is entitled to his expenses for going to the foreign state and returning to Alabama. Quarterly Report of Attorney General, Volume 17, page 369.

By analogy, it is my opinion that you may now file your claim with the proper State authorities, the fugitive being charged with a felony, and the same should be paid by the proper State officials. You have done all that is required of you under the law to do in this matter. You have obtained the proper extradition papers and have returned this fugitive from the State of Indiana to the State of Alabama. It is not within your power to force a trial and conviction of this fugitive. After you have returned the fugitive from the foreign state, it is then up to the courts as to whether or not

this person is ever tried and is up to a jury as to whether such persons will be convicted.

You are, therefore, advised that you, having done all that is required of you to do under the law, may claim your expenses for the return of this fugitive regardless of whether or not this fugitive is ever tried.

Yours very truly,

A. A. CARMICHAEL
Attorney General

November 10, 1950.

Hon. Bankhead Bates, Director
State Department of Public Safety
CAPITOL

Mobile County—Inferior Criminal Court—Jurisdiction.

1. The Inferior Criminal Court of Mobile County has criminal jurisdiction over the entire county.

2. Justices of the Peace Courts of Mobile County do not have criminal or quasi-criminal jurisdiction within the corporate limits of the City of Mobile or five miles beyond such corporate limits.

Opinion by Assistant Attorney General McQueen.

Dear Sir:

Your request for an official opinion, bearing date of September 29, 1950, is as follows:

"In making arrests for traffic law violations outside the City of Mobile, our officers often find it feasible to set these cases in courts other than the Inferior Court of Mobile (they often use the Justice of the peace). In order that these officers may be certain which is the proper court to set their cases, it would be appreciated if you would answer the following questions:

"1. With reference to traffic law violations how far does the jurrisdiction of the Inferior Court of Mobile extend.

"2. If the jurisdiction extends into or overlaps the jurisdiction of a Justice of the Peace, does the Inferior Court have absolute jurisdiction or is it concurrent with the Justice of the Peace."

The Inferior Criminal Court of Mobile County was established by Act. No. 588, Local Acts 1898, page 1164. In answer to your question numbered 1, the following is quoted from Section 4 of the said act:

"Be it further enacted, That said judge of the Inferior Criminal Court of Mobile County shall be a magistrate and conservator of the peace, with all the powers of a magistrate or conservator of the peace, which are or may be by law conferred upon justices of the peace within said county. **He shall have and exercise all the jurisdiction, and have all the other**

other powers and authority in said county which are or may be by law conferred on justices of the peace in criminal and quasi-criminal cases; shall have the same power to imprison or sentence defendants to hard labor for the county for non-payments of costs as is possessed by the Criminal Courts of this State. Shall have jurisdiction of all bastardy proceedings and proceedings to keep the peace, such as are now exercised by justices of the peace; shall have jurisdiction of all cases for abusive insulting or obscene language as prescribed in Section 4306 of the Code of Alabama; shall exercise final jurisdiction in such cases; shall also have final jurisdiction of cases arising under that section of the Code of Alabama which forbids jumping on or off moving trains, exercising final jurisdiction in all such cases. * * *" (Emphasis supplied.)

This act has been amended as follows: Local Acts 1900, page 2575; Local Acts 1907, page 82; Local Acts 1927, page 329; Local Acts 1932, page 34; and Local Acts 1945, page 85.

The above amendments have all been carefully examined, and the territorial jurisdiction of the court has not been increased or diminished by any of the said amendments.

You will note the underscored words in the above quotation from the original act. This quotation, in my opinion, grants to the Inferior Criminal Court of Mobile County jurisdiction throughout the entire County of Mobile. Thus, jurisdiction of this court with reference to traffic law violations would extend throughout Mobile County.

In answer to your question numbered 2, you will note from the above quotation from the act that the Inferior Criminal Court of Mobile County "shall have all the other powers and authority in said county which are or may be by law conferred on justices of the peace in criminal and quasi-criminal cases."

Thus, the Inferior Criminal Court is granted the same jurisdiction exercised by justices of the peace.

Further answering your question numbered 2, you are advised that, by a local law passed by the Legislature at its 1900-01 Section (Act. No. 289, General Acts 1900-01, page 794, approved February 6, 1901), criminal and quasi-criminal jurisdiction was taken away from justices of the peace within the then corporate limits of the city of Mobile, and for five miles beyond the then corporate limits of said city . See **State ex rel. Holcombe v. Stone, County Treasurer,** 232 Ala. 16, 166 So. 602, and Act. No. 289, supra. I have no means of determining the corporate limits of the city of Mobile as of February 6, 1901. However, these geographical facts can be ascertained and determined in Mobile.

No doubt, the city limits of Mobile have been extended from time to time since the effective date of the above-cited act; and, unfortunately, this act has not been amended since its original effective date. Therefore, your enforcement officers will be faced with a borderline question as to where the jurisdiction of the justice of the peace begins. As stated above, the jursidiction of the Inferior Criminal Court of Mobile extends throughout Mobile County, and, as a result, this court would have concurrent jurisdiction with the justice of the peace beyond the five-mile limit above referred to.

As indicated above, it would be impossible for me to set out by stakes and bounds the precise dividing line beyond which the justice of the peace would have no jurisdiction in criminal and quasi-criminal matters.

As a matter of practical expediency, I would suggest that up until such time as you can definitely establish the corporate limits of Mobile as of February 6, 1901, that your officers set all cases occurring within the city of Mobile and within five miles of the present city limits in the Inferior Criminal Court of Mobile. On the other hand, all cases occurring beyond this limit may be set, safely, either in the Inferior Court or in the justice of the peace court.

Very truly yours,

A. A. CARMICHAEL
Attorney General.

November 13, 1950.

Hon. Ralph P. Eagerton, Chief Examiner
Department of Examiners of Public Accounts
CAPITOL

Taxation — Tax Assessors — Tax Collectors — Exemption.

1. The method of assessing taxes and the procedure of abstracting same as outlined in Chapter 7 of Title 51, Code of Alabama 1940, requires that the tax assessor include the amount of county taxes remitted, claimed by the taxpayer when making return to the tax assessor and allowed by the tax assessor when preparing the abstract for the tax collector.

2. The assessor cannot be held responsible where the county governing body grants an exemption contrary to law.

Opinion by Assistant Attorney General Halsey.

Dear Sir:

Your request for an official opinion bearing date of June 2, 1950, is as follows:

"I am revising my original request for your official opinion which was submitted to you under date of February 13, 1950, in order to make my request more comprehensive.

"Your official opinion is hereby respectfully requested for the guidance of the Department of Examiners of Public Accounts on the following questions, viz:

"In some Counties wherein Ad Valorem tax exemptions are granted certain factories, industries and plants under the provisions of Title 51, Section 3, Code of Alabama, 1940, the Tax Assessors do not omit the County taxes remitted when preparing the book showing the amount of taxes for the Tax Collector, which book is required by Title 51, Section 65, and generally referred to as the Collector's Abstract. By this procedure the Tax Collector is charged with the collection of certain County taxes which have been remitted. The Tax Collector does not collect these remitted taxes, therefore he must be relieved of the charge, this is accompublished by having the county governing body approve the taxes remitted as an error in assessing, as provided for in Section 209 and 210 of Title 51.

"In other Counties the Tax Assessors do not include in the abstract prepared for the Tax Collector the amount of County taxes that have been remitted, the exempted amounts being omitted when the taxes are assessed in accordance with the requirements of Title 51, Section 41.

"1. Does the method of assessing taxes and the procedure for abstracting same as outlined in Chapter 7 of Title 51, Code of Alabama, 1940, require the Tax Assessor to omit the amount of County taxes remitted, claimed by the taxpayer when making return to the Tax assessor and allowed by the Tax Assessor, when preparing the abstract for the Tax Collector?

"2. Where the Tax Assessor does omit the County taxes remitted when preparing tha abstract for the Collector is the Tax Assessor responsible for the taxes that were not collected, in cases where exemptions are granted by the governing body contrary to law?

"Tax Assessors will soon commence abstracting taxes for collection therefore your opinion relative to question #1 furnished promptly will enable this Department to establish uniform procedure in the preparation of current abstracts."

My answer to your first question is in the negative. It appears clear that the procedure for abstracting the tax assessments requires that the tax assessor include the amount of county taxes remitted, claimed by the taxpayer when making return to the tax assessor and allowed by the tax assessor, when preparing the abstract for the tax collector.

In Biennial Report of Attorney General, 1928-30, page 86, the inquiry was whether, where exemptions had been provided by the board of revenue of the county, such taxes should be assessed by the tax assessor, the exemption to apply to the taxes assessed. In that opinion rendered under date of December 10, 1928, it was stated:

"* * * By the terms of the Act the Board of Revenue is empowered 'to remit the taxes assessed.' This necessarily means that the taxes should be assessed and the remission by the Court of County Commissioners acts upon the taxes assessed. * * *"

Another opinion promulgated by this office under date of December 4, 1935, reported in Quarterly Report of Attorney General, Vol. 1, page 303, held that the effect of Sections 31 and 33 of the Revenue Act of 1935 "required that an assessment must be made up and signed, even though the only property assessed is exempt from taxation."

Further emphasis upon this proposition is supplied by the definition of the word "remit" in an opinion under date of October 4, 1944, and found in Quarterly Report of Attorney General, Vol. 37, page 10. There the writer set out the definition in Webster's New International Dictionary, Second Edition (1936), which was as follows:

"'5. To refrain from exacting, inflicting, or enforcing; as to remit a penalty or the performance of an obligation.'"

Thus, it follows that in order for there to be a remission of a tax, there must have been a tax assessment in existence.

An opinion rendered under date of January 19, 1945, appearing in Quarterly Report of Attorney General, Vol. 38, page 7, sheds sufficient light on the problem posed by your second inquiry, to conclude that the tax assessor is not responsible where exemptions are granted by the county governing body contrary to law. The county governing body is authorized by Title 51, Section 3, Code of Alabama 1940, "to remit the taxes assessed for all county and municipal purposes, except for county school and district purposes," on certain factories and plants for equipment thereof designated therein. Certainly, it cannot be maintained that the tax assessor is to be held accountable where exemptions are mistakenly allowed by the county governing body. In this opinion, it was said:

> "County governing bodies in the exercise of such power and jurisdiction necessarily exercise a quasi judicial function or discretion. They may either grant or refuse the application, as they deem best for the county's interest and the public interest. And their orders, in the absence of fraud, accident or mistake, apparent on their face, or in the absence of anything to show a lack of jurisdiction apparent on the face of application or order, should, until impeached in a court of competent jurisdiction, be accorded the force and effect of a judgement, in accord with the presumption of law as to public officers and bodies that they have performed a duty required by law when their records so import. **Wiley v. Wilhite,** 201 Ala. 638, 79 So. 110, **Grayson v. Schwab,** 235 Ala. 398, 401; **Barry v. Stephens,** 176 Ala. 93, 57 So. 467; **Gamble v. Andrews,** 187 Ala. 302, 65 So. 525.
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> "It would seem equally clear in the present instance that the tax assessor and Tax Collector alike must look to the orders of the county board exclusively as to such exemptions, unless and until they are impeached in a court of competent jurisdiction, rather than to the opinions or suggestions of others which run counter to such orders."

In view of the foregoing, my answer to your second question is in the negative.

Very truly yours,

A. A. CARMICHAEL
Attorney General.

November 13, 1950

Hon. Thomas A. Peavey,
Probate Judge and
Chairman, Board of Revenue,
Escambia County,
Brewton, Alabama

County — Public Health.

The county board of revenue or other governing body of the county may appropriate funds out of its treasury for the purpose of treating persons afflicted with tuberculosis and who are in indigent circumstances, in any hospital or sanitorium in the State.

Opinion by Assistant Attorney General Johnson.

Dear Sir:

Your request for an official opinion, bearing date of March 18, 1950, is as follows:

"Re: Escambia County Board of Revenue.

"(1) Kindly advise the Board of Revenue of Escambia County, and its Judge of Probate—whether or not said Board and said County has legal right to pay or appropriate **extra** and additional funds to carry on 'Health Work' in Escambia County or in other Counties, **and grant** the request made by the County Health Officer and County Health Department of Escambia County, Ala.—to appropriate County Funds in addition, to the regular, annual, appropriation of $7,000.00 per annum for Health Work in Escambia County. The request of said County Health Officer is, and shows;

"(2) That Mrs. Elmore Blair of Escambia County has small children; she has a severe case of tuberculosis; she is in need of an operation; which she refuses; she does not confine herself at home: she mingles with the public; she is a menance to her children and also a menance to the public health of the community; she has been heretofore placed by the County Health Department and Health Officer in the Batson Memorial Tuberculosis Sanatorium at **LaFayette Alabama;** That said Department has advanced and paid her hospital expenses at LaFayette up to April 3rd, 1950. The Health Officers request the County to continue this Health Work and maintain her at said Sanatorium; That her expenses in said Sanatorium after April 3rd will be $2.00 per day payable monthly in advance by the County until she either recovers or dies; He also requests the County to pay said Sanatorium the additional sum of **$80.00** for the cost of administering a special and costly drug which is needed in the treatment of said patient. He requests said drug to be paid for before April 3rd, 1950; all the foregoing requests to be paid out of the County Revenues **not** heretofore appropriated for County Health purposes;

"(3) The Board of Revenue, its Attorney, and said Health Department are not able to find any law authorizing such County appropriation. That said Board will not allow said request or pay said claim unless or until its legality and validity is approved by you; and for that reason your opinion is requested; Is it legal; Is it discretionary; Is it mandatory; on the Board of Revenue.

"This claim is a lifetime obligation and the Sanatorium is **out of** Escambia County, Alabama. If this claim is allowed it is more than likely that numerous other claims will be presented to the Board of Revenue for allowance by the County Health Department. A **memorandum** of details is hereto annexed. Hoping for your ruling at an early date."

In answer to your request, you are advised that, in my opinion, the County Board of Revenue of Escambia County has legal authority to pay the expenses of the person mentioned in your request for her maintenance and support at a sanatorium located outside of Escambia County, if such person is in indigent circumstances. See Quarterly Report of Attorney General, Volume 18, page 100.

Your attention is directed to Title 22, Section 190, Code of Alabama 1940, which reads as follows:

"The governing body of any county or city in this state may make an appropriation or appropriations out of their respective treasuries to aid in maintaining and taking care of sick and wounded persons who are unable to provide for themselves in any hospital maintained for the care of the sick and wounded. Any county or city owned or controlled hospital may accept patients from any county or city."

You will observe that Section 190, supra, does not make it mandatory upon the county governing body to pay such expenses but allows it to do so, if in its discretion, it sees fit and proper. Thus, it is discretionary with the board of revenue.

You will also observe that Section 190, supra, restricts such appropriation or appropriations to persons who are unable to provide for themselves. The question of fact that arises here is one upon which this office is not in position to rule. This question of whether the financial condition of the person is such that she is unable to pay her own expenses is a question that addresses itself to the discretion of the board of revenue.

You mentioned in your request that this person refuses to cooperate with the Health Department. She will not confine herself to her home and is a menance to her children and also a menance to public health of her community.

In this regard, your attention is directed to an opinion of this office found in Quarterly Report of Attorney General, Vol. 48, page 299, wherein it was held that under the athority of Title 22, Sections 47 and 74 of the Code of Alabama 1940, that the county health officer is authorized to isolate or quarantine persons having tuberculosis who refuse to submit to treatment or otherwise so conduct themselves as to be a menance to the health of the community.

Yours very truly,

A. A. CARMICHAEL
Attorney General.

November 15, 1950

Hon. R. P. McRae, Administrator
Alabama Alcoholic Beverage Control Board,
CAPITOL.

Alabama Alcoholic Beverage Control Board — Advertising.

The general distribution of cards and calendars, with the trade name of a wholesale beer distributor thereon, to retailers constitutes illegal advertising within the preview of Title 29, Section 12, Code of Alabama 1940.

Opinion by Assistant Attorney General Screws.

Dear Sir:

Your request for an official opinion, bearing date of August 29, 1950, is as follows:

"On or about June 16, 1950, we had a meeting of all wholesale beer distributors in Alabama, and at the meeting we explained regulations that were formally adopted by the Board on June 19, 1950, copies of such regulations are attached hereto.

"In the meeting held on June 16th with the wholesale bear distributors, several matters were discussed at length, and it was decided at that time that the use of the trade name of the various wholesalers in programs, campaigns, and such, would constitute a violation of the provisions of our state law.

"It has now been brought to our attention by a representative of Brown-Bigelow, of St. Paul, Minnesota, that wholesale distributors in Alabama have refused to buy cards with the name of the distributor on one side and baseball or football schedules, or calendars on the reverse side. In one particular instance, the wholesale distributor canceled his order for two decks of playing cards encased in a book binder with the inscription on the outside of the wholesale distributor's trade name.

"It will be appreciated very much if you will advise me as soon as possible if the giving away and use of cards mentioned above and calendars with the name of the wholesale distributor written thereon, and distributed by the wholesaler to his retail trade would be in violation of Section 12, Title 29, Code of Alabama 1940."

I am of the opinion that your inquiry should be answered in the affirmative.

Title 29, Section 12, Code of Alabama 1940, provides as follows:

§ 12. Advertising.—There shall be no electric signs, painted signs, or signs of any kind, displayed outside any place of business advertising alcoholic beverages as enumerated and defined in this chapter; and there shall be no advertising of alcoholic beverages as enumerated and defined in this chapter, except through newspapers, magazines and radio broadcasting stations, provided, however, that malt or brewed beverages as herein defined may be advertised by means of billboards."

It will be noted that advertising of malt or brewed beverages by the giving away and use of cards and calendars does not come with any of the exceptions of the above quoted section. The question then presents itself as to whether the giving away and use of such cards and calendars, as defined in your letter of inquiry, and distributed in the manner as therein set forth, constitutes advertising of malt or brewed beverages. In my judgement, this query should be answered in the affirmative.

The general distribution of cards and calendars, with the trade name of a wholesale beer distributor thereon, to retail dealers is purely an advertising program. It could serve no other purpose than to call to the attention of the retail dealers generally the name of the wholesale beer distributors for the purpose of stimulating sales by or purchases from such distributor. Such cards and calendars are more than mere business cards with the name of the distributor or its representative thereon, and are used as advertising media. They do not come within the exception of the opinion of this office rendered to the Chairman, Alabama Alcoholic Beverage Control Board on May 29, 1937 (Quarterly Report of Attorney General, Vol. 7, p. 166), which dealt with advertising of alcoholic beverages by use of cards.

Yours very truly,

A. A. CARMICHAEL,
Attorney General.

November 15, 1950.

Hon. J. P. Shaffer, Clerk,
Montgomery County Board of Revenue,
Montgomery, Alabama

Officers—Employers—Tax Collectors
Montgomery County.

A clerk employed in the office of the Tax Collector of Montgomery County, Alabama, under a fixed statutory compensation, cannot be paid extra compensation for the performance of duties within the scope of original employment under the provisions of Section 1 of Act No. 98, Local Acts 1947, page 72, authorizing the furnishing of said tax collector extra clerical assistance.

Opinion by Assistant Attorney General Screws.

Dear Sir:

Your request for an official opinion, bearing date of October 27, 1950, is as follows:

"Section 1 of a local act approved July 8, 1947 (page 72 Local Acts of 1947) reads as follows:

" 'That the Tax Collector of Montgomery County, Alabama, shall be paid an annual salary, which shall be paid to and received by him in lieu of all other compensations, fees or emoluments, as follows: The tax collector shall receive an annual salary of four thousand dollars net, except as herein otherwise provided, and an allowance of seven thousand dollars per annum for office help as follows: one clerk at thirty six hundred

dollars per annum, and **one clerk at twenty four hundred dollars per annum** and one thousand dollars per annum for other expenses and ex-officio services of the said tax collector. The said one thousand dollars to be paid to the tax collector in monthly installments. **The Board of Revenue or other like governing body of like jurisdiction of Montgomery County, Alabama, is also authorized and empowered to furnish the tax collector of said county extra clerical assistance not to exceed nine hundred dollars per annum whenever in their discretion such assistance is necessary. The personnel of said assistants to be selected by the said Tax Collector.'**

"(Underscoring by the writer, the pertinent parts of the section to the question involved.)

"I have received the following letter from the Tax Collector:

" 'October 26, 1950

" 'Hon. J. P. Shaffer,
" 'Clerk, Board of Revenue,
" 'Montgomery County,
" 'Montgomery, Alabama

" 'Dear Sir:

" 'Effective October 1st, please pay Edna G. Townsend $75.00 per month from contingent fund. Local Act 1947 gives my office two clerks, one at thirty six hundred and one at twenty four hundred. I was unable to secure a clerk for twenty four hundred that I thought I could do the work required of them. I did, however, find one that had a good deal of experience and is doing an excellent job and does not mind the hard work and extra hours at thirty three hundred dollars per annum.

" 'I know this arrangement is working better for my office than trying to work a seventy-five dollar per month person.

" 'Trusting this is satisfactory, I am

" 'Yours very truly,

" 'J. M. Hobbie,
" 'Tax Collector'

"Under the provisions of the City-County Merit Act approved September 2, 1949, the elected officials of Montgomery each have two clerks not subject to the rules of the Merit System and it is the presumption of the writer that the salaries of such employees is still governed by the Local Act above quoted.

"The Tax Collector has only two clerks; one salary at $3600.00 and one at $2400.00, but the law above quoted gives the Board of Revenue the right to approve the appointment of an additional clerk at $75.00 per month.

"The Tax Collector requests by his letter (above) that the salary of one of his clerks (the one receiving $2400.00 per annum) be supplemented by the amount the law permits ($75.00 per month) for extra clerical assistance instead of hiring an additional clerk for $75.00 per month.

"Can I, as disbursing officer of the county, legally pay this clerk $3300.00 per annum instead of $2400.00 if the Board of Revenue approves same?"

I am of the opinion that your inquiry should be answered in the negative.

Act No. 528, General and Local Acts 1949, page 819, approved September 2, 1949, creating and establishing a county-wide personnel system in Montgomery County in the City of Montgomery, supersedes all former provisions of law with reference to the employment and compensation of county and city officers and employees included therein and not exempted therefrom.—Opinion of the Attorney General to Tax Assessor, Montgomery County, on July 11, 1950 (Ms.). Section 2 (h) of this act specifically exempts two clerks designated by each county elected official from the operation thereof. Consequently, the two employees in the office of the Tax Collector of Montgomery County would be exempted and their compensation still governed by Section 1 of Act No. 98, Local Acts 1947, page 72, which provides for one clerk at $3600.00 per annum and one clerk at $2400.00 per annum.

The proviso in Section 1 of Act No. 98, supra, "The Board of Revenue or other like governing body of like jurisdiction of Montgomery County, Alabama, is also authorized and empowered to furnish the tax collector of said county extra clerical assistance not to exceed $900 per annum whenever in their discretion such assistance is necessary. The personnel of said assistants to be selected by said tax collector," does not, in my opinion, authorize the increasing of the compensation of a clerk, whose statutory salary is fixed, to the extent of the $900.00 for performing duties within the scope of the $900.00 for performing duties within the scope of the original employment.

In dealing with an analogous situation to the one at bar, this office in an opinion rendered to the Secretary of the Board of Revenue of Tuscaloosa County on January 31, 1941, (Quarterly Report of Attorney General, Volume 22, page 67), held that a clerk already employed may not perform clerical services after office hours and be paid for such services out of the contingency fund created by 1936 Local Acts, page 39, when such clerical services are within the scope of his employment. In said opinion it was stated:

"The evident purpose and intent of the Act was to create a contingent fund 'for the purpose of employing additional clerical help and assistance' and, in my opinion, it was the intention of the Legislature that 'additional help and assistance' should not be construed to effect an increase of compensation of an employee for the performance of duties within the scope of his original employment.

"It is, therefore, my opinion that an employee, regularly employed in the performance of clerical services, cannot be paid for services performed after his official hours when such duties are within the scope of his original employment, out of the contingent fund created by Act No. 71, supra. The language of Act No. 71, supra, is not broad enough to admit of any other construction."

In view of the former ruling of this office, I am constrained to hold that the clerk under present consideration cannot be paid extra compensation in addition to the fixed statutory salary for the performance of duties within the scope of the original employment.

Yours very truly,

A. A. CARMICHAEL,
Attorney General.

November 22, 1950

Hon. Carl E. Sellers,
Tax Collector,
Houston County,
P. O. Box 282,
Dothan, Alabama

Hospitals—Taxes—Tax Collectors.

Where a hospital association or corporation organized under Act No. 211, General Acts 1945, page 330, or Act No. 46, Acts 1949, page 68, has been designated as the agency of the county to construct and maintain hospital facilities, the proceeds of any special hospital tax levied and collected pursuant to Amendment LXXVI, Constitution of Alabama 1901, should be paid to such corporation or association.

Opinion by Assistant Attorney General Hardin.

Dear Sir:

Your request for an official opinion bearing date October 14, 1950, is as follows:

"We are collecting a special Hospital Tax of four mills in Houston County and I would like to know who I should pay the money to as it is collected.

"I have offered it to the Custodian of County Funds but he thinks it should be paid to the Hospital Corporation or the treasurer of the Hospital Association.

"We are having this money accumulated and we want to disburse it as soon as possible.

"I will appreciate a ruling at your earliest convenience."

Pursuant to Act No. 211, General Acts 1945, page 330, and Act No. 46, Acts 1949, page 68, public associations or corporations may be formed for the purpose of constructing and maintaining hospital facilities.

It is provided by constitutional amendment that the electors of all counties except Mobile and Jefferson may vote to levy and collect a special hospital tax to carry out the purpose of the Acts referred to above. Amendment LXXII Constitution of Alabama 1901 (Vol. 1 1949 Cumulative Pocket Part, page 81).

Your attention is directed to Act No. 640, Acts 1949, page 981, which provides in part:

"Section 2. The governing body of any county in which a special county tax for public hospital purposes has...been...authorized...shall have the power to designate a hospital corporation in the county as the agency of the county to acquire, construct, etc. . . public hospital facilities. . ." and

"Section 3. When a hospital corporation has been designated as the agency of the county to acquire, construct, etc... proceeds of the special county tax... thereafter collected shall be paid over to the hospital corporation..." **(emphasis added).**

You are advised that if the governing body of Houston County has by resolution designated a hospital corporation or association to construct and maintain the county's hospital facilities then the proceeds of the four mill tax should be paid to such corporation or association. Otherwise, the proceeds of the four mill tax should be paid to such corporation or association. Otherwise, the proceeds are to be paid to the Custodian of County Funds to be maintained in a special fund for the purposes of constructing and maintaining hospital facilities.

Very truly yours,

A. A. CARMICHAEL,
Attorney General.

November 27, 1950

Dr. A. R. Meadows,
State Superintendent of Education,
State Department of Education,
Montgomery, Alabama.

Counties—Schools.

County governing bodies are authorized to make appropriations to county boards of education to purchase a post-treating plant and to pay for the initial charging of said plant, to be used as part of the vocational educational program by authority of Title 52, Section 388, Code of Alabama 1940.

Opinion by Assistant General Straub.

Dear Sir:

Your request for an official opinion bearing date of October 30, 1950, is as follows:

"On May 20, 1949, you ruled that county governing bodies are authorized to make appropriation to county boards of education for the construction of post-treating plants to be used as a part of Vocational Education courses by authority of Title 52, Section 388, Code of Alabama, 1940. (Pages 108-109 Quarterly Report of the Attorney General of Alabama, Volume 55, April 1, 1949-June 30, 1949.) Superintendent Frank Stewart, Secretary of the Cherokee County Board of Education, states that said Board desires to secure possession of a post-treating plant constructed by State plans and specifications, and with the approval of the Cherokee County Board of Education. Possession of said plant can be obtained by paying for the cost of equipment and materials used in construction, and the cost of the initial charging of such plant.

"I am asking your opinion as to whether or not the Cherokee County Board of Revenue can make an appropriation to the Cherokee County Board of Education to reimburse a person, persons, or vendor for amounts paid for the purchasing of equipment used in the construction of a post-treating plant approved by the Cherokee County Board of Education, including the initial charging of such plant, provided the post-treating plant is to be used exclusively as a Vocational Education laboratory under the exclusive operation, management, and control of the school authori-

ties, and is not operated for commercial purposes in competition with private enterprise?"

In Quarterly Report of Attorney General, Vol. 55, page 108, it was held that county governing bodies could appropriate funds to county boards of education to build post-treating plants under Title 52, Section 388, Code of Alaboma 1940.

The above section states that the appropriation is to be "...used in **providing** classrooms, laboratories and shops..." (Emphasis supplied.) There is no requirement that the county board of education actually build the classrooms, laboratories or shops. Therefore, I see no reason why an appropriation cannot be made to pay for such classrooms, laboratories or shops already constructed to proper specifications and with prior approval of the county board of education.

Title 52, Section 388, Code of Alabama 1940, also provides that the appropriation may be used to maintain such classrooms, laboratories, or shops. Therefore, it is my opinion that the appropriation may be made to cover the initial charging of the plant.

Very truly yours,

A. A. CARMICHAEL,
Attorney General.

December 4, 1950

Hon. J. W. Stuart,
Judge of Probate,
Jackson County,
Scottsboro, Alabama

Counties—Jackson County—Roads and Bridges.

1. The Board of Revenue of Jackson County established by Act No. 65, General Acts, Fifth Special Session, 1950, approved November 4, 1950, does not have authority to employ road and bridge employees of the county.

2. The supervisor of roads and bridges of Jackson County may not employ the son of a member of the Board of Revenue of Jackson County as a road and bridge employee of the county.

Opinion by Assistant Attorney General Arbuthnot.

Dear Sir:

Your request for an official opinion bearing date of November 17, 1950, is as follows:

"I beg to refer you to a local act passed by the Legislature, known as House Bill 81, by Mr. John O'Neal of Jackson County.

"I beg to refer you to the following portion of Section 9 of the said bill:

"'. . . No person employed by the Supervisor shall be related to him or the chairman or any member of the Board within the third degree of consanguinity, computed by the rules of civil law, by blood or marriage. Should the Supervisor employ any such relative he shall be guilty of a misdemeanor and on conviction shall be fined not less than one hundred dollars ($100) and not more than five hundred dollars ($500) . . .'

"One of the members of our Board of Commissioners has heretofore, in his district, in road work, employed his son, as operator of a shovel. The question has arisen as to whether the employment of his son is in violation of the quoted part of Section 9 of the said act.

"In the event the board should employ this son without any action of any kind on the part of the father, would this action on the part of the board be in violation of the quoted part of Section 9?

"You will recall that in the matter of the purchase of materials by the county, it has been held that if the member of the board who is related to the seller does not participate in the purchase, such purchase does not violate the law. We are wondering if the same principle applies as to employment when relationship is involved."

Section 9 of Act 65, General Acts, Fifth Special Session, 1950, approved November 4, 1950 (a part of which section is set out in your inquiry), provides in part as follows:

Section 9. The Board must within 30 days after passage of this Act employ a Supervisor of Roads and Bridges for Jackson County, subject to the confirmation of the members of the Alabama House of Representatives from Jackson County and the State Senator from the Fifth Senatorial District . . .

. . . The Supervisor shall have the duty of supervising the constructing, repairing, and maintaining of roads and bridges in the county . . .

. . . He shall have complete charge of the road and bridge employees of the county, including their selection, compensation, supervision and dismissal. No person employed by the Supervisor shall be related to him or the chairman or any member of the Board within the third degree of consanguinity, computed by the rules of civil law, by blood or marriage. Should the Supervisor employ any such relative he shall be gulty of a misdemeanor and, on conviction, shall be fined not less than one hundred dollars ($100) and not more than five hundred dollars ($500). . . .

Under the above section, the supervisor of roads and bridges for Jackson County shall have complete charge of the road and bridge employees of the county, including their selection, compensation, supervision, and dismissal. This authority includes the employment of all road and bridge employees of the county.

It is my opinion that without question the employment by the supervisor of roads and bridges of the son of a member of the Board of Revenue of Jackson County, would be in direct violation of the prohibition in Section 9, supra, against the employment by the supervisor of roads and bridges of a person related to him or the chairman or any member of the Board of Revenue of Jackson County.

This office has held that while a member of the court of county commissioners cannot employ a relative to do work for the county, the court may employ a relative of one of the commissioners if the commissioner to whom the person is related does not sit as a member of the court when the person is employed. Biennial Report of Attorney General, 1934-36, page 165; 1922-24, page 438.

The opinions referred to above have no application to the question presented by your inquiry, inasmuch as under the provisions of Section 9, supra, road and bridge employees of the county are employed by the supervisor of roads and bridges and **not** by the Board of Revenue of Jackson County.

Very truly yours,

A. A. CARMICHAEL,
Attorney General.

December 4, 1950

Hon. D. H. Russ,
Mayor,
City of Enterprise,
Cofeee County,
Enterprise, Alabama

Municipalities—Rent Control.

A municipality may not pass a rent control ordinance reinstating rent control.

Opinion by Assistant Attorney General Nachman.

Dear Sir:

Your request for an official opinion bearing date of October 4, 1950 is as follows:

"The mayor and council have indicated favoring the reinstatement of rent control, and has instructed me to request you to render an opinion advising if cities can or cannot pass a rent control ordinance that will be legal."

Your request is answered by General Acts 1949, Act. No. 340, page 512. In this Act the Legislature of Alabama has declared and enacted that Federal rent control is no longer necessary in Alabama or in any part of Alabama. The stated purpose and intent of the Act is to terminate all Federal rent control in Alabama. The Act further declares that Federal rent control is no longer necessary in the State of Alabama or in any part of Alabama.

Very truly yours,

A. A. CARMICHAEL,
Attorney General.

December 4, 1950

Hon. Tom C. Garner,
Judge of Probate,
Jefferson County,
Court House,
Birmingham, Alabama

Bails—Bonds—Sureties.

The bond described in the subject request does not comply with the requirements of Act No. 199, General Acts 1949, Section 201, pp. 230, 232.

Opinion by Assistant Attorney General Nachman.

Dear Sir:

Your request for an official opinion bearing date of October 25, 1950, is as follows:

"I would appreciate your early opinion on the following question.

"WHEREAS, the Principal designs to engage in the business of making bonds and charging therefor, that in addition to other qualifications of bail as set out in Section 201 of an Act No. 199 of the Legislature of Alabama, approved July 8, 1949, the Principal is required to furnish bond with corporate surety authorized to act as Surety on bond in this State for the amount of Ten Thousand Dollars.

"Would a surety bond, properly executed and worded as stated below, be one that I could approve in accordance with Section 201, of Act No. 199 of the General and Local Acts of Alabama, regular session, 1949?

" 'KNOW ALL MEN BY THESE PRESENTS that we, the Hand Bonding Company, as Principal and Maryland Casualty Company of Baltimore, Maryland, as Surety, are held and firmly bound unto the State of Alabama or any political sub-division thereof in the sum of Ten Thousand and No/100 Dollars ($10,000.00) for the payment of which, well and truly to be made, we bind ourselves and each of us, our heirs, executors, administrators, successors and assigns, jointly, severally and firmly by these presents. The right of exemption under the Constitution and Laws of Alabama are hereby waived.

"Sealed with our seals and dated this the 16th day of October, 1950.

"NOW, THEREFORE, the condition of the foregoing obligation is such that if the said Principal shall pay all sums of money that may be due the State of Alabama or any political sub-division thereof by virtue of any judgement absolute being rendered against said principal, as Surety on said bond or bonds this obligation to be null and void, otherwise to remain in full force and effect.

" 'It is expressly understood and agreed that regardless of the number of judgements obtained against the Principal and regardless of the number of years this bond shall continue in force and the number of premiums which shall be payable or paid, the liability of the Surety shall not

be cumulative and shall in no event exceed in the aggregate the sum of Ten Thousand Dollars ($10,000.00).

Hand Bonding Company

MARYLAND CASUALTY COMPANY
Surety

By

Attorney-in-Fact.

The foregoing is approved
this.....day of....., 1950.

Prbate Judge, County of....."

You should not approve the subject bond as being a proper bond under General Acts 1949, Act No. 199, page 230, Section 201.

There are two immediate defects in the proposed bond. The most serious defect is contained in the last paragraph thereof. It appears to be the clear intent of the Legislature that a principal, engaging in the business of making bail bonds and charging therefor, is to be bonded with a corporate surety in the amount of $10,000, and that the bond of such principal shall at all times amount to $10,000. The last clause of the proposed bond states "the liability of the Surety shall not be cumulative and shall in no event exceed in the aggregate the sum of ten thousand dollars ($10,000)." This clause would not assure that the principal on the bond would at all times be bonded in the amount of ten thousand dollars ($10,000).

The Legislature was concerned with guaranteeing the payments of sums of money due the State of Alabama, or a political subdivision thereof, by virtue of judgements absolute having been rendered against persons who had become sureties on bail bonds, and who were engaged in the business of making such bonds and charging for such bonds. A corollary to this intent, as clearly stated in the Act, was that such sureties (principals herein) be bonded at all times in the amount of $10,000. Theoretically, the last clause of your proposed bond might cause a situation where the principal would be bonded in a very small amount.

The second defect in the bond which you propose is found in the preceding paragraph. There is an insufficient description of "as surety on said bond or bonds." Though this phrase follows the language of Section 201, supra, that section, in preceding clause describes the "surety on said bond" as being one who is engaged in the business of making bail bonds. In order that the bond which you propose may be clear as to the role of the principal on this bond, his activity as surety on another bond should be described. This defect, of course, is not so important as the first defect discussed above.

Very truly yours,

A. A. CARMICHAEL,
Attorney General.

December 4, 1950

Hon. L. A. Whetstone,
Tax Assessor,
Jefferson County,
106 Courthouse
Birmingham 3, Alabama

Ad Valorem Taxes—Exemptions—Taxation.

Real property up to $200,000 owned by a subordinate lodge of the Grand Lodge of the Ancient Free and Accepted Masons is exempt from ad valorem taxation by virtue of its charter.

Opinion by Assistant Attorney General Nachman.

Dear Sir:

Your request for an official opinion bearing date of May 31, 1950 is as follows:

"I respectfully request your opinion as to whether or not the parcel of property referred to herein is subject to Ad Valorem taxes. Mr. W. S. Wilson, Treasurer of the North Birmingham Masonic Lodge located at 2710 38th Avenue North, Birmingham, Alabama, has paid, under protest, the taxes on a lot which is owned by Masonic Lodge No. 591 A. F. and A. M., described under Unit 3-40887-1 as:

"N. 10 Ft Lots 18 & 19 & all Lot 20, Blk 184, No. Bham. Sur.

"While this vacant lot is owned by the above Masonic lodge, there is no building erected on same, and it is not being used at the present time for lodge purposes. However, Mr. Wilson has informed me that this vacant lot has been purchased from the City of Birmingham and that it is being held for the construction of a Masonic temple thereon.

"On May 17, 1950, he was written to me, as Tax Assessor, requesting that a refund be made to the lodge. For your further information attached is a copy of Mr. Wilson's letter, as well as a copy of tax receipt #76728, paid to the Tax Collector of Jefferson County on May 4, 1950, in the sum of $11.78.

"Your usual prompt attention to this matter will be appreciated."

The property which you have described in your request is exempt by virtue of the Acts of Alabama 1859, page 458, as amended by the Acts of Alabama 1875, page 158. The charter granted by the Alabama Legislature under these Acts expressly exempts the property and effects of the eleemosynary corporation from taxation up to $200,000. See: **Ware Lodge No. 435 v. Harper,** 236 Ala. 334, 182 So. 59. The **Ware Lodge** case controls your situation.

There is nothing to show that property in question is not "dedicated to charitable purposes."

It would appear, therefore, that the Lodge in question is entitled to a refund on ad valorem taxes paid to you under protest, on the lot described in your request.

Very truly yours,

A. A. CARMICHAEL,
Attorney General.

December 7, 1950

Hon. Emmett Perry,
Circuit Solicitor,
Tenth Judicial Circuit,
Jefferson County,
Birmingham, Alabama

Department of Conservation—Game and Fish—Justices of the Peace—Jefferson County.

Justice of the Peace Courts in Jefferson County have final jurisdiction over all game and fish offenses arising under Title 8, Code of Alabama 1940.

Opinion by Assistant Attorney General Harris.

Dear Sir:

Your request for an official opinion, bearing date of November 3, 1950, is as follows:

"Honorable V. O. King is Justice of the Peace for Precinct 16 at Morris, Jefferson County, Alabama. He has been trying cases arising under Title 8 of the Code of Alabama 1940. It is his idea that Title 8 Section 47 of the Code of Alabama 1940 gives him jurisdiction of all offenses arising under the conservation statute. He wrote to you on 19 October 1950 asking for an opinion on this question. Apparently this request for an opinion was referred by you to Assistant Attorney General A. J. Harris who replied to Judge King as follows:

" 'Your letter dated 19 October to Honorable Albert A. Carmichael, Attorney General, has been referred to me for reply.

" 'Your letter is not clear as to the exact question which you wish answered. I am assuming, however, in your reference to Section 47, Title 8 of the 1940 Code, that the matter involved is one of appeal to the Circuit Court.

" 'My interpretation of Section 47, Title 8 of the 1940 Code is that justices of the Peace or Inferior Criminal Courts of the State are given final jurisdiction over game and fish laws or rules based thereunder. In other words, if a defendant who is charged with such a violation comes into your court and demands a jury trial, such a request is properly refused. If the defendant is convicted, he may then take an appeal to the Circuit Court and demand a jury trial.

" 'Under Section 47, he has no right to a jury trial in either a justice Court or in a Court of Inferior jurisdiction; but, on the other hand, he must stand trial in such courts. His right of jury trial comes with his right to appeal.

" 'If this is not the question imposed by you, please be more specific in your request and I shall be glad to attempt to answer it.'

"The State Examiner, represented here by Honorable Eley Frazer, Jr., calls our attention to Title 62, Section 186 which is a local law applying only to Jefferson County, the first sentence of which reads as follows: 'Justices of the Peace in the county shall not have final jurisdiction to try and dispose of any criminal cases.'

"As I dictate this letter, both Judge King and Mr. Frazer are in my office. Judge King contends that, under the above quoted letter of Assistant Attorney General Harris, he can proceed to try these conservation cases. Judge King states that most of these cases involved Hunting without a License; Hunting with a Spotlight; Killing game out of Season, etc.

"Specifically, will you please give us your official opinion as to whether or not the conservation statute had the effect of repealing the local law, Title 62 Section 186 of the Code of Alabama 1940?

"I have given Judge King my opinion that the conservation statute, though later passed by the Legislature, does not repeal the local act in question. He disagrees with this and has the advice of Assistant Attorney General Harris to the contrary. If convenient, I should like to request that you prepare a sufficient number of the copies of your opinion for distribution to each of the Justices of the Peace in Jefferson County. I understand that there are approximately fifty of these justices of the peace. Since this is the hunting season and many of these cases are likely to arise and since the opinion of Mr. Harris, in my opinion, is being misconstrued, the urgency of rendering an early opinion is obvious."

It is my opinion that Title 8, Section 47, Code of Alabama 1940, repeals Title 62, Section 186, Code of Alabama 1940, which is a local law pertaining to Jefferson County alone, insofar as said local law deals with the final jurisdiction of the game and fish laws as set out under Title 8 of the Code of Alabama 1940.

The two sections of the Code, which pertain to the subject of your inquiry, are as follows:

Title 8, Section 47, Code of Alabama 1940:

"JURISDICTION OF OFFENSES; DISPOSITION OF FINES. —Justices of the peace or the inferior criminal courts of the counties of the State of Alabama shall be and are hereby given final jurisdiction to try and convict persons, firms or corporations violating any of the provisions of the game and fish laws, or the rules and regulations promulgated thereunder; and they shall remit to the director on or before the first day of each month all fines and forfeitures collected by them for the violation of such laws, rules and regulations, as prescribed in the game and fish laws, together with a statement of the name of the person, firm or corporation convicted of such violation, the time of such conviction, the amount of the fine or penalty, the date of the remittance, and the specific charge for which the defendant was tried."

Title 62, Section 186, Code of Alabama 1940:

JURISDICTION OF JUSTICE OF PEACE IN CRIMINAL CASES. —Justices of the peace in the county (Jefferson) shall not have final jurisdiction to try and dispose of any criminal cases. In cases where warrants are issued by justices of the peace in misdemeanor cases, the same shall be made returnable to the inferior courts of the county having jurisdiction to try such cases, and in cases of felonies such justices of the peace shall conduct preliminary investigations and where probable cause is shown shall bind the defendants over to the circuit court of the county to await the action of the grand jury."

It is a well recognized rule of law that the presumption is that a general law does not repeal a prior local statute, and the local statute will be per-

mitted to stand if it can be done upon any reasonable construction. **Ferguson v. Court of County Commissioners of Jackson County,** 187 Ala. 645, 65 So. 1028.

The doctrine of repeal by implication is not favored in law and will not be resorted to except where the repugnance or opposition is too clear and plain to be reconciled. **Pierce v. Bank of Mobile,** 33 Ala. 693; **Iverson v. State,** 52 Ala. 170; **Coan v. State,** 224 Ala. 584, 141 So. 263.

The local law considered in this opinion, however, is totally in opposition to the later general law and is repugnant to it. There is no reasonable field of operation by a just construction of both statutes, "and a statute by implication repeals all existing statutes plainly inconsistent therewith." **City of Birmingham v. Baranco,** 4 Ala. App. 279, 58 So. 944.

Therefore, the two statutes as set out above being in irreconcilable conflict, the later general law is the governing law and repeals by implication the prior existing local law on the same subject, insofar as the prior existing local law is in conflict with the later general law dealing with the final jurisdiction of the justice of peace courts in game and fish cases.

It should be understood, however, that this opinion does not repeal in toto Section 186, supra, but only repeals said section insofar as it affects the final jurisdiction of justice of peace courts in game and fish offenses arising under Title 8 of the Code of Alabama 1940.

Very truly yours,

A. A. CARMICHAEL,
Attorney General.

December 7, 1950

Hon. C. C. Horton,
Director,
State of Alabama,
Department of Veterans Affairs,
Montgomery, Alabama

Veterans—Schools—Funds—Governor.

The Veterans' Training Board has authority to receive and disburse state and federal funds for the purposes of implementing the educational benefits and other provisions of Public Law 346 and 610.

Opinion by Assistant Attorney General Barton.

Dear Sir:

Your request for an official opinion bearing date of November 27, 1950 is as follows:

"Your official Opinion is respectfully requested in connection with the following question.

" 'May the Veterans' Training Board, established by the Governor's Executive Order Number 13, dated May 12, 1949, (which Executive Order was amended under date of November 27, 1950 by Executive Order Number 20), receive and disburse state and federal funds in the performance of its responsibilities,' as explained below.

"Following the enactment by Congress of Public Law 346, with amendments, which provided educational training and refresher and retraining opportunities for veterans of World War II, certain private and proprietary schools, operated for profit, were approved for the training of veterans under the law stated above by the agency then empowered to authorize such approval; viz., the State Department of Education.

"Executive Order Number 13 referred to above had the effect of revoking the authority of the State Department of Education to approve this particular type of institution, and vested the approval authority in a board designated as the 'Veterans Training Board.' Under the said Executive Order, sole authority to approve private educational institutions within the State of Alabama for veterans' training under Public Law 346, as amended, was extended to this 'Veterans' Training Board.'

"The Order further provides 'said Board shall be composed of five members, with the Superintendent of Education, the Director of the Department of Veterans' Affairs and the Director of the Department of Labor being Members of the Board, with the other two members being appointed by the Governor from nominees from veterans' organizations in the State of Alabama; that said Board shall have the right to adopt such rules and regulations as may be necessary to effectively perform its duties.'

"Executive Order Number 20, bearing date of November 27, 1950, provides, in addition, in pertinent part as follows: 'The said Board shall have the power and authority to receive and disburse funds or appropriations, to employ administrative and clerical personnel to pay necessary salary and travel expense of such personnel, and to incur and pay for such other necessary and incidental expense as may be necessary or desirable in the proper and efficient discharge of the duties and functions for which the said Board was created.'

"The Board is presently properly constituted as provided for in said Executive Order, the undersigned being, by title, a Member.

"Public Law 610 of the 81st Congress provides, among other things, that the Veterans Administration may reimburse state approval agencies, (such as the Veterans' Training Board), for necessary expenses incurred in the examination, investigation and approval or disapproval of proprietary schools. Under the provisions of the quoted law, a contract has been consummated between the Veterans Administration and the Governor of Alabama, which would allow the receipt of such reimbursement as contemplated by Public Law 610, such contract naming the Veterans' Training Board as the agency in Alabama which will examine, investigate and approve or disapprove proprietary schools. The contract further designates the Department of Veterans' Affairs of the State of Alabama as the agency to which such reimbursement payments shall be made for the account of the said Veterans' Training Board.

"The Veterans' Training Board has no operating or working funds, and since all payments under the contract are to be made on a reimbursement basis, it is impossible to implement the contract without working capital or operating funds. The passage of Public Law 610 was not

anticipated in sufficient time to allow an appropriation of such a working capital to be provided by the State Legislature, and to remedy the defect occasioned by the unforeseen contingency, the Governor is desirous of making available to the said Veterans' Training Board, from his Emergency Fund, the sum of $2500.00 with which to supply the necessary operating capital. At the expiration of the existing contract, or at the expiration of the training program contemplated under Public Law 346, as amended, whichever is later, it is expected that the monies referred to will be restored to the Governor's Emergency Fund, or State General Fund, whichever is applicable.

"The question now arises, as presented in the opening paragraph, as to whether or not, under the Executive Order Number 13, as amended by Executive Order Number 20 and existing applicable statutes, the Veterans' Training Board is authorized to receive; first, the sum of $2500.00 from the Governor's Emergency Fund; second, such reimbursement as may be provided by the Veterans Administration, the third, the right to disburse from both funds in the payment of salary and necessary expenses to employed personnel appointed to perform the functions jointly under Executive Order Number 13 and Public Law 610 of the 81st Congress.

"Since the contract referred to herein contains the proviso that the initial state-wide survey of proprietary schools shall be accomplished prior to December 31, 1950, prompt action is necessitated, and the receipt of your official Opinion is urgently requested at the earliest possible date.

"There is attached hereto copies of each of the Executive Orders for such additional information as they may contain."

I am of the opinion that your inquiry should be answered in the affirmative.

Title 55, Section 105, Code of Alabama 1940, pertaining to emergency appropriations and the method of their use, provides as follows:

"To the end that all expenses of the state may be brought and kept within the budget, the budget appropriation bills shall contain a specific sum or sums as an emergency appropriation or appropriations. Such sum shall not, however, exceed two percent of the total amount appropriated by such bill. The manner of allotment of such emergency appropriation shall be as follows: Any department, board, bureau, commission, agency, office or institution of the state or any person or persons in charge of any activity in which the state is interested, desiring an allotment out of such appropriation, shall present such request in writing to the department of finance with such information as it may require, and such request shall be handled and allotments may be made pursuant thereto as in the case of regular allotments. Such allotments shall be made only for any purpose authorized by law for which no specific appropriation has been made or for which inadvertently an insufficient appropriation has been made.'

The said Veterans' Training Board, established by Executive Order Number 13, dated May 12, 1949, as amended by Executive Order Number 20, dated November 27, 1950, was established to implement the provisions of Public Law 346, Seventy-Eighth Congress, June 22, 1944, and Public Law 610, Eighty-First Congress, July 13, 1950.

The Governor had full power and authority to establish said Board, since there could be no proper administration of the provisions of Public Laws 346

and 610, supra, without state administrative machinery designed for that purpose. It is clear that said Board cannot function without incurring administrative expenditures.

Full and exclusive power is vested in the Legislature to determine the amount of appropriations necessary for the performance of essential functions of government. Section 72, Constitution of Alabama 1901; **Abramson v. Hard** 229 Ala. 2, 155 So. 590. The legislative power of appropriation, necessary to the payment of money out of the state treasury, cannot be delegated. **Opinion of the Justices,** 244 Ala. 386, 13 So. (2d) 674. But the Legislature can appropriate an ascertainable sum to be paid under the direction of a state agency for such public benefits as may be directed by the agency, in conformity to standards of legislative policy declared by the Legislature. **Opinion of the Justices,** supra.

The 1949 Legislature appropriated the sum of $100,000.00 for the Governor's Emergency Fund, expenditure of which is limited by the provisions of Section 105, supra. See the General Appropriation Act, Act No. 522, General Acts 1949, page 781. Certainly the education of veterans is an "activity in which the state is interested," and administrative expenditures by the said Veterans' Training Board, for the purpose of putting in effect the benefit provisions of Public Laws 346 and 610, supra, comprise a "purpose authorized by law for which no specific appropriation has been made."

I am of the opinion, therefore, that the Governor, under the authority in him vested by Section 105, supra, can allot to the said Veterans' Training Board the sum of $2,500.00, or other sum, from the Governor's Emergency Fund, and that said Board has full power and authority to receive and disburse such sum or sums, either state or federal, for purposes reasonably calculated to assure to veterans of this state the benefits provided by Public laws 346 and 610, supra.

Very truly yours,

A. A. CARMICHAEL,
Attorney General.

December 7, 1950

Hon. Eugene B Henry,
Commissioner of Licenses,
Jefferson County,
117 Court House,
Birmingham 3, Alabama

Taxation—License Tax—Municipalities—Counties.

When gasoline is delivered outside of a municipality and inside of Jefferson County, the taxes paid on the sale of the gasoline are to be distributed to Jefferson County under the provisions of Act No. 385, General Acts 1947, pp. 280, 287.

Opinion by Assistant Attorney General Nachman.

Dear Sir:

Your request for an official opinion bearing date of October 26, 1950 is as follows:

"Please advise me in reference to a General Act of 1947 Legislature, page 280 H. 689, particularly on section 3, sub-sections (a), (b) and (c), also section 12.

"The question is this: The Southport Petroleum Company, bonded dealer and distributor at Birminghamport, Alabama, which is outside of any municipality sold to the Dixie Oil Company tax paid gasoline at Birminghamport. The said Dixie Oil Company, retail dealers sent their trucks to Birminghamport for said gasoline and brought same to Birmingham and other municipalities and sold it. In making my distribution under section twelve, should I pay the tax to Jefferson County or to the Municipality where same was retailed?"

Your question is answered by Section 12 of Act No. 385, General Acts 1947, page 280. The distribution is to be made to Jefferson County since no delivery of gasoline on which tax was paid was effected inside a municipailty in Jefferson County.

Section 12, supra, provides that each municipality of the county, within the corporate limits of which gasoline has been delivered according to the report provided for in Section 3 (c) of the Act, is entitled to payment of one cent on each gallon of gasoline shown on such report to have been delivered within the corporate limits of that municipality. The county treasury, under the terms of Section 12, is entitled to the "entire remainder." Therefore, if there has been no delivery inside the corporate limits of the municipality, (and your facts indicate Birminghamport, the place of delivery is not a municipality), then the "entire remainder" would include the whole tax. Hence the county treasury is properly entitled to the distribution of the tax.

Very truly yours,

A. A. CARMICHAEL,
Attorney General.

December 8, 1950

Hon. Chas. W Thompson,
Superintendent of Education,
Coosa County,
Rockford, Alabama.

Offices and Officers—County Boards of Education—Legislature—Schools.

1. The provisions of Section 280, Constitution of Alabama 1901, prohibit the holding of office as a member of the County Board of Education and as a member of the State Legislature by the same person at one and the same time.

2. The question of resignation from one or the other of such offices is a personal matter addressing itself to the individual office holder, but he may not hold both at one and the same time.

3. Vacancies occurring in the membership of the County Board of Education are to be filled in accordance with provisions of Title 52, Section 64, Code of Alabama 1940.

Opinion by Assistant Attorney General Hardin.

Dear Sir:

Your request for an official opinion, bearing date of November 27, 1950, is as follows:

"On August 12, 1950, I wrote you with reference to Mr. Robert C. Smith, Goodwater, Alabama, who was nominated as a member of the Coosa County Board of Education in the spring of 1948,, and elected in the November General Election of 1948.

"You will find enclosed a copy of my letter of August 12, 1950. Under the date of August 21, 1950, you gave an informal response to my inquiry of August 12.

"A copy of your letter under the date of August 21, 1950, is also enclosed.

"In the latter part of your letter of August 21, you made the following statements: 'Please bear in mind that the above is an informal response to your inquiry and does not constitute an official opinion of this office; however, should it be that you desire my official opinion of these matters, I will be glad to furnish you with same."

"Mr. Smith was elected as Representative from Coosa County in the general election of November, 1950.

"I am requesting that you give your official opinion with reference to the inquiries in my letter of August 12, 1950. This will be appreciated very much."

Your letter of August 12 1950, to which you refer in your current request for opinion, is as follows:

"This is to make inquiry concerning one of the members of the Coosa County Board of Education.

"Mr. Robert C. Smith, Goodwater, Alabama, was nominated in the spring of 1948, and elected in the November General election of 1948, as a member of the Coosa County Board of Education for the period of time from the last regular meeting in November of 1948 to the general election of 1954. In other words, he was elected to serve a six year period. He is now serving that term, and has for some two years.

"In the spring primary of 1950, he has been nominated as the Representative from Coosa County, and will be elected in November election to that office for a period of four years.

"I wish to make three inquiries. Inquiry No. 1: Is it legal for Mr. Smith to continue as a Board Member during the time that he will serve as Representative from Coosa County in the Alabama Legislature? Inquiry No. 2: If he must resign as Board Member, when and in what manner should he present the Board of Education with his resignation? Inquiry No. 3: If Mr. Smith should resign as Board Member, does the Coosa County Board of Education have the necessary authority to appoint someone from Mr. Smith's School District to serve the remaining term, which will continue until the fall election of 1954?

"Your opinion and answer to these questions at your earliest convenience will be appreciated."

You first inquire as to whether or not Mr. Smith may continue to serve as a member of the County Board of Education during the time he will serve as Representative from Coosa County in the Alabama Legislature. My answer to such inquiry is in the negative. To do so would be violative of the provisions of Section 280, Constitution of Alabama 1901.

This office has consistently held that a member of the County Board of Education holds an office of profit within the meaning of Section 280, supra, and may not, therefore, also hold another office of profit under this State at one and the same time. Unquestionably, one holding office as a member of the House of Representatives likewise holds an office of profit within the meaning of the above constitutional provision. I must, therefore, advise that Mr. Smith may not hold both offices at one and the same time. See in the connection, Quarterly Report of Attorney General, Volume 19, page 158; Biennial Report of Attorney General, 1934-36, page 641; Quarterly Report of Attorney General, Volume 16, page 35; Biennial Report of Attorney General, 1928-30, page 12; Biennial Report of Attorney General, 1918-20, page 444.

Your second inquiry concerns the time and manner in and by which Mr. Smith should present his resignation to the Board of Education. This, I would advise, is a matter addressing itself to Mr. Smith and the County Board of Education. If, however, it be that Mr. Smith desires to resign his office as a member of the County Board of Education, I would advise that same be done prior to the time he enters upon his duties of office as a member of the legislative body from Coosa County. Actually, no such resignation is absolutely necessary for it is a familiar rule of law that acceptance of an office of profit within the meaning of Section 280, supra, by a person already holding an office of profit within the field of operation of said section operates ipso facto as a resignation or vacation of the office first held. Mechem, **Public Officers** (1890), Secs. 421, 425; Throop, **Public Officers,** Sec. 31; **Mann v. Darden, et al.,** 171 Ala. 142, 54 So. 504; **State ex rel. Camp v. Herzberg,** 224 Ala. 636, 141 So 553; 29 Cyc. 1382, Note 81.

With reference to your third and last inquiry concerning the manner in which the vacancy upon the County Board of Education will be filled in the event Mr. Smith resigns therefrom, I would call your attention to the provisions of Title 52, Section 64, Code of Alabama 1940, which statute provides and establishes the method of filling vacancies occuring in the membership of the County Board of Education. Said statute is as follows:

"§ 64. Vacancies. In the event a vacancy occurs in the office of members of the county board of education, the vacancy shall be filled by appointment by a majority of the remaining members of the county board of education, and the appointee shall hold for the unexpired term. In the event the vacancy is not filled by the remaining members of the county board within thirty days, the state superintendent of education shall fill such vacancy, by appointment. The county superintendent of education shall notify the state superintendent of education when a vacancy in the office of member of the county board of education has not been filled within thirty days."

In my judgement, the language of such statute gives clear answer to your third inquiry.

Very truly yours,

A. A. CARMICHAEL,
Attorney General.

December 13, 1950

Hon. Knox McRea,
Director of Finance,
Department of Finance,
CAPITOL.

Officers and Offices—State Superintendent of Education—Schools—Salaries—Appropriations.

1. As of January 15, 1950, the salary of the State Superintendent of Education will be $7500.00 per annum under Act No. 37, H. 66, approved October 31, 1950, (Ms.), and will be payable out of the $200,000.00 appropriated to the Department of Education by Act No. 563, General and Local Acts 1949, p. 883 (Educational Appropriation Bill).

2. The $1800.00 needed to supplement the $5700.00 appropriated annually for the salary of the State Superintendent of Education by Act No. 563, supra, should come out of that part of the appropriation to the Department of Education listed as "Other Salaries."

Opinion by Assistant Attorney General Screws.

Dear Sir:

Your request for an official opinion, bearing date of November 28, 1950, is as follows:

"The Legislature of Alabama in the Fifth Special Session 1950, by Act No. 37 provided as follows:

" 'The salary of the State Superintendent of Education shall be seven thousand five hundred dollars ($7,500.00) per annum, to be paid in installments from the annual appropriation to the State Department of Education.'

"This Act is to become effective January 15, 1951.

"Act No. 563, General Acts 1949 (Educational Appropriation Bill) in Section 2 thereon provides as follows:

" 'Department of Education. There is hereby appropriated for each of the fiscal years 1949-50 and 1950-51 to the Department of Education the following amounts:

" 'Salary of the State Superintendent	$ 5,700.00
" 'Other Salaries	149,480.00
" 'Other Expenses	44,220.00
" 'Equipment Purchases	600.00
" 'Total	200,000.00'

"Your official opinion is respectfully requested as to whether or not said Act No. 37 repeals, supplements, or changes in any manner the provisions of said Act No. 563 wherein the appropriation for the salary of the State Superintendent of Education is set at $5,700.00. In the event you determine that said Act No. 37 shall be given preference, please also advise what funds the additional $1,800.00 shall be paid.

"Inasmuch as it is necessary to make the allotments for the expenditures in the second quarter at this time, it will be appreciated if you will give this matter your immediate attention as the budget officer is required to present the allotments prior to the date of the expenditure."

In answer to the first part of your inquiry, it is my opinion that as of January 15, 1951, the salary of the State Superintendent of Education will be $7500.00 per annum under the provisions of Act No. 37, H. 66, approved October 31, 1950 (Ms.), which act supplements the annual appropriation of $5700.00 for the salary of the State Superintendent of Education as contained in Act No. 563, General and Local Acts 1949, p. 883 (Education Appropriation Bill).

As to the second part of your inquiry, it is my opinion that said salary will be payable out the $200,000.00 appropriated to the State Department of Education by Act No. 563, supra; and that the additional $1800.00, needed to supplement the $5700.00 already appropriated for the salary of the State Superintendent of Education, should be paid out of the appropriation for "Other Salaries," as listed under the appropriation to the Department of Education.

The act in question, providing for the salary of the State Superintendent of Education, carries with it an appropriation for the amount of said salary. —**Riggs v. Brewer,** 64 Ala. 282; **Reynolds v. Taylor,** 43 Ala. 420. See **Eagerton v. Graves,** 252 Ala. 326, 40 So. 2d. 417. Normally, said appropriation would be payable from the general fund of the State. Section 1 of Act No. 37, supra, is quoted in your letter of inquiry. If the last clause thereof had been omitted, there would have been no question that the $7500.00 would have been payable out of the general fund of the State. However, some significance must be

given to this last clause which is, "to be paid in installments from the annual appropriation to the State Department of Education." This proviso, in my judgment, clearly shows the legislative intent as to the source from which the $7500.00 should be obtained. This source is specifically stated to be "the annual appropriation to the State Department of Education." This appropriation is found in Act No. 563, supra, as quoted in your letter of inquiry. The legislative intent is not only indicated but clearly expressed. Cf. **Riggs v. Brewer,** supra.

Moreover, it is to be noted that the appropriation of $200,000.00 to the State Department of Education (including $5700.00 for the salary of the State Superintendent of Education) is contained in the appropriation bill for the support, maintenance and development of public education of Alabama (Act No. 563, supra) rather than being in the general appropriation bill, as are appropriations to the other departments of the State under Act No. 522, General and Local Acts 1949, page 781. This is further indicative of the Legislative intent that the $7500.00 should be paid from the appropriation contained in Act 563, supra, rather than being an additional appropriation from the general fund of the State.

The question now presents itself as to the specific part of the appropriation to the Department of Education from which the additional $1800.00 needed to supplement the $5700.00 already appropriated for the salary of the State Superintendent of Education, is to be paid. As heretofore stated, it should be paid out of the $200,000.00 appropriated to the Department of Education. There is no expression in regard to a specific part of this appropriation from which it should be paid. In my opinion, it should come out of the $149,480.00 appropriated for "Other Salaries."

Very truly yours,

A. A. CARMICHAEL,
Attorney General.

December 13, 1950

Hon. D. E. Marley, Director
Department of Commerce
CAPITOL

Insurance — Corporations — Fees — Taxes.

An insurance company, in order to write insurance of a type different from that for which the company originally qualified must meet the statutory requirements for qualification pertaining to the additional type insurance, including payment of filing fee and other requirements incidental to qualification.

Opinion by Assistant Attorney General Amos.

Dear Sir:

Your request for an official opinion bearing date of November 13, 1950 is as follows:

"We respectfully request an opinion from you in connection with the following matter.

"There has been brought into being what is called Multiple Line Underwriting by Fire and Casualty Insurance Companies organized under the laws of the State of Alabama and other States. Multiple Line Underwriting is determined in the following manner.

"A Fire Insurance Company desires to write Miscellaneous Casualty Insurance as defined in Title 28, Section 141, 142, 143, Code of Alabama 1940.

"SECTION 141—'Insurance companies must have paid-up capital of one hundred thousand dollars—in addition to the insurance laws now in force, governing insurance companies generally, insurance companies doing an accident and health, liability, fidelity, surety, plate glass, steam boiler, burglary and theft, credit, sprinkler, title, fly-wheel, automobile, property damage, workmen's collective, **or any other** casualty business shall be required to have a capital stock fully paid up in cash of not less than one hundred thousand dollars.'

"A Company is authorized and qualified to write fire and allied lines in this State, the Fire Insurance Company may or may not have Charter Power to write Miscellaneous Casualty Insurance in the absence of any law, it has been the requirement of the Bureau of Insurance of the State of Alabama that as Miscellaneous Casualty Insurance is altogether a different class and kind of insurance than Fire and Allied Lines which is not included in the above Sections that before a Fire Company may write this type coverage it will be necessary that the Fire Company which may already be qualified in the State also qualify as a Miscellaneous Casualty Carrier and in so doing, the company must pay the fee as provided, namely $201.00, that is $200.00 filing fee under Section 814, Title 51, Code of Alabama 1940 and $1.00 for the impression of the Superintendent's Seal, Section 48, Title 28, Code of Alabama 1940.

"The same would apply in the case of a Miscellaneous Casualty Carrier applying to write Fire and Allied Lines in this State.

"Section 141, Title 28, Code of Alabama 1940 provides that Miscellaneous Insurance Companies must have a fully paid up capital of $100,000, this is for Miscellaneous Lines as outlined in the Section.

"Now Fire and Allied Lines are altogether different types of coverage offered under the laws governing miscellaneous insurance as defined in Section 141, Title 28.

"The capital requirement of a fire and allied lines carrier shall be not less than $100,000 as defined in Section 64, Title 28, Code of Alabama 1940. This Section is broad enough to cover a Miscellaneous Casualty Company also as to its capital requirement.

"In other words each company is required to have not less than $100,000 of actual paid in capital if the statute is interpreted in this manner.

"Apparently Section 141, Title 28, Code of Alabama 1940 very distinctly points out Miscellaneous Insurance, which various classes

of insurance are Casualty and the Section makes no mention of Fire Insurance and those lines Allied to Fire Insurance.

"The Fire and Casualty Insurance Companies feel that since Multiple Line Underwriting is now an established fact that they should be allowed to write all coverages in one company without additional fees or charges.

"In the absence of any specific law relating to Multiple Line, the established policy of the Bureau of Insurance since 1936 has been in the way and manner as outlined in this Request for Opinion using the named Sections of the Alabama Code as the basis for this action.

"Section 812, Title 51, defines an insurance company and the various classes and kinds of insurance that may be written. Certain of the kinds and classes of insurance mentioned in this Section are classified as Miscellaneous Insurance as defined in Section 141. Title 28 and certain of the classes and kinds mentioned are allied to Fire Insurance.

"This Section makes mention also of Mutual Aid or Industrial Companies or Associations are defined in Sections 245 through Section 281, Code of Alabama 1940.

"May one insurance company issue all kinds and types of insurance stated in Section 812, Title 51 or must each Company writing those lines designated as Casualty and those lines designated as Fire and Allied Lines operate under separate Certificates of Authority, in other words be licensed separately? May a Fire or Casualty Insurance Company issue all lines including Mutual Aid?

"SECTION 814, TITLE 51, CODE OF ALABAMA 1940

"'Filing Fee—At the time of filing the certified copy of the charter or articles of incorporation of such insurance company, together with the financial statement, the superintendent of insurance shall collect from such company the sum of two hundred dollars as a filing fee, to be paid into the treasury, and thereafter annually before the first day of March a similar annual statement shall be filed by the insurance company with the Superintendent of Insurance, and a like filing fee of two hundred dollars shall be collected for the use of the State of Alabama.

"Honorable Frank N. Julian, Superintendent of Insurance, held in 1936 in the qualifying of a casualty insurance company that had been transacting business in the State since 1926 that before the Bureau of Insurance could issue a Certificate of Authority for this company to transact business in this State to write Fire and Allied lines it must have the required $100,000 additional capital, in other words, Mr. Julian required $100,000 of capital to write casualty lines and $100,000 capital to write fire and allied lines. The minimum capital requirement was $200,000 which capital the company had.

"Did the Bureau of Insurance err in requiring this company to pay in the State Treasury an additional $201.00 fee? Did the

Bureau of Insurance err in issuing to this company a separate Certificate of Authority to write Fire and Allied Lines, or should the Bureau of Insurance have amended the present Certificate of Authority of this company to include fire and allied lines without payment of the additional fee?

"Various Sections of the law pertain to one type of coverage only and there is no mention of the other such as Title 28, Section 141, Code of Alabama 1940. Do you interpret this Section to mean that any company writing lines other than those outlined in this Section must qualify as a separate company provided it has the required capital or may a company writing these lines have its present Certificate of Authority amended to include other lines not mentioned as casualty business?

"The Bureau of Insurance in requiring this company to qualify as a separate carrier also required the agents of the company to be licensed separately, in other words, it was required that a separate agents license be issued to each agent that desired to write all coverage offered by the company. The Bureau of Insurance required one agent's license to write fire and allied lines and one agent's licenses to write miscellaneous casualty insurance. The fee for each agent's license is $4.00 for the license and $1.00 for the Official Seal of the State, total $5.00, Title 51, Section 822, Code of Alabama 1940.

"Section 79, Title 28, Code of Alabama 1940 defines an agent as any person who solicits insurance in behalf of any insurance company or for the agent of any insurance company, etc.

"Did the Bureau of Insurance err in requiring separate agents licenses or should the Bureau of Insurance have only issued to each agent one license to cover all lines written?

"Section 816 of Title 51 of the Code of Alabama 1940 is hereby amended to read as follows: 'Amount of tax on foreign companies —Each foreign fire or marine or fire and marine insurance company shall pay a premium tax amounting to one and one-half dollars on each one hundred dollars, and every other foreign insurance company, including foreign life insurance companies, shall pay a premium tax amounting to two dollars and fifty cents on each one hundred dollars of the gross premiums received by it or them for business done in this State, whether the same are actually received by said company in this state or elsewhere, during the year ending the thirty-first day of December preceding, less return premiums.' (See attached Premium Tax Statements).

"In your opinion does this statute separate the different type companies for tax purposes or may one company write all lines and merely pay premium tax on those lines?

"Various Sections of the law pertain to one type of coverage such as Title 28, Sections 141 through 144 and we find no provision made for the other and since Multiple Life Underwriting is now an established fact, your opinion is respectfully requested if the established policy of the Bureau of Insurance since 1936 is in error?

"You will find attached hereto for your convenience Schedule of General Requirements Stock Miscellaneous Insurance Company and Schedule of General Requirements Stock Fire or Marine Insurance Company. You will notice in the Schedule of General

> Requirements for Stock Miscellaneous Insurance Company points out, 'The term "Miscellaneous Insurance Company" is applied to an insurance company engaged in one or more of the following insurance businesses: Accident and health, liability, fidelity, surety, plate glass, steam boiler, burglary and theft, credit, sprinkler, title, flywheel, automobile property damage, workmen's collective, Workmen's compensation, or any other casualty business.'
>
> "There are a great number of companies awaiting your opinion in this matter and it is requested that the matter be expedited and your opinion rendered as rapidly as possible as the various companies interested are beginning to request issuance of certain licenses, etc., for the year 1951 all of which is being held in abeyance until your opinion in the matter is in the possession of the Bureau of Insurance."

There is no statutory provision in this State which either authorized or prohibits what is known as "multiple line" underwriting by insurance companies.

I am informed by the Bureau of Insurance that it has been the policy of that agency to allow an insurance company writing one line of insurance to also write insurance in another line if such company qualifies as a carrier under the statutory requirements for such additional line of insurance. This qualification has heretofore included the payment of an additional filing fee, and payment of an additional fee for the affixing of the stamp of the Superintendent of Insurance. Also, agents writing the additional line have been required to obtain separate licenses for that line under the provisions of Title 51, Section 822, Code of Alabama 1940. It is my opinion that the course of action taken by the Bureau of Insurance is correct.

The requirements with regard to the minimum amount of capital stock, deposit of securities with appropriate official, etc., differ according to the type of insurance written by the company. The tax on gross premiums differs, depending on whether the taxpayer is a fire and marine insurance company or other type insurance company. Title 51, Sections 816 and 819, Code of Alabama 1940, as amended by Act No. 156, General Acts 1945, page 196.

A holding that qualification, for instance, as a fire carrier alone would give that company authority to write every other type insurance would be directly contrary to statutory provisions which specify different capital and security deposit requirements for different type insurance companies. To pursue this illustration, the following excerpts from Title 51, Sections 816 and 819, Code of Alabama 1940, as amended by Act No. 156, General Acts 1945, page 196, are helpful:

> "Section 816.—**Each foreign fire or marine or fire and marine insurance company shall pay a premium tax amounting to one and one-half dollars** on each one hundred dollars, and **every other foreign insurance company,** including foreign life insurance companies, **shall pay a premium tax amounting to two dollars and fifty cents** on each one hundred dollars of the gross premiums received by it or them for business done in this state . . . (Emphasis supplied)
>
> "Section 819.—**Each domestic fire or marine or fire and marine insurance company shall pay a premium tax amounting to one and one-half dollars** on each one hundred dollars, **and each other domestic insurance company,** including domestic life insurance

companies, **shall pay a premium tax amounting to two dollars and fifty cents** on each one hundred dollars of the gross premiums received by it for business done in the state . . ." (Emphasis supplied)

These quotations show an obvious legislative intent to separate insurance companies according to the **type** insurance written. It cannot be seriously argued that an insurance company writing fire **and** casualty insurance would be liable only for the one and one-half dollar tax applicable to fire insurance alone.

Your attention is also directed to Title 28, Section 141, 142, and 143, Code of Alabama 1940. Within these sections are provisions which relate solely to "casualty" insurance companies. The requirements for qualification as a casualty carrier are specifically enumerated without reference to any other type insurance. These provisions add weight to my conclusion that an insurance company, in order to write any specific line of insurance, must qualify under the specific provisions relating to that line just as if it were a different company, regardless of the fact that such company may already be engaged in writing another line of insurance.

As was pointed out above, this State has no legislation authorizing an insurance company originally qualified for one line of insurance to write to a different line by the simple expedient of amendment of its certificate. It is, therefore, my opinion that in order to write insurance of a type different from that for which the company originally qualified it must meet the statutory requirements for qualification under the additional type insurance. This will necessarily include payment of a filing fee, licensing of agents, and other requirements incidental to qualification.

Very truly yours,

A. A. CARMICHAEL,
Attorney General.

December 21, 1950

Hon. E. S. Morgan, Director,
Alabama State Docks and Terminals,
Mobile, Alabama

Department of State Docks and Terminals—Labor Agreements—Rates of Pay.

1. Pursuant to the provisions of Title 38, Section 17, Code of Alabama 1940, the State, acting through the Department of State Docks and Terminals, is vested with the authority to enter into agreement as to seniority, working conditions, and rates of pay with those persons employed in connection with the operation of terminal railways of such department, including those persons employed as yardmasters.

2. In the event the department enters into such agreement, it is the duty of said department to insure that such agreement is in conformity with like agreements, applicable to like employees, as are then in effect with reference to the employees of interstate railroads

operating in the same territory with the terminal railways of the State Docks and Terminals.

3. The compensation of those employees included within the purview of Title 38, Section 17, supra, is fixed by such statute and the limiting features as to salary or compensation found within Title 41, Section 152, Code of Alabama 1940, have no application thereto.

Opinion by the Attorney General.

Dear Sir:

Your request for an official opinion, bearing date of December 14, 1950, is as follows:

"I respectfully request your official opinion on the following matter:

"The State Docks and Terminals now has an agreement with its yardmasters as authorized by Section 17, Title 38, Code of Alabama 1940, which said agreement fixed their rates of pay heretofore at Four Hundred Twenty Nine and No/100 ($429.00) Dollars, per month. There is now a new proposed agreement, a copy of which is attached hereto, which will in effect increase their rates of pay in the sum of Fifty Four and 86/100 ($54.86) Dollars, or Four Hundred Eighty Three and 86/100 ($483.86) Dollars, per month, or an annual amount of Five Thousand Eight Hundred Six and 36/100 ($5,806.36) Dollars.

"It will be noted under terms of the agreement attached that additional wage increases may automatically occur since the agreement, as to the rates of pay, is based on the cost of living according to the Bureau of Labor Statistics Price Index.

"(A) Please advise me if I am authorized to pay the rates of pay fixed in said agreement to yardmasters now employed at the State Docks.

"(B) Will you please advise me if the new rate of pay fixed by this agreement is valid under Section 17, Title 38, Code of Alabama 1940, which adopts the provisions of Title 45, Section 151-163 USCA, (Railway Labor Act), or does it violate Section 152 of Title 41, Code of Alabama 1940."

Answer to your inquiry involves a consideration of the pertinent provisions of Title 38, Section 17, Code of Alabama 1940, in conjunction with Title 41, Section 152, Code of Alabama 1940. The former statute, after granting to the State, acting through the Department of State Docks and Terminals ,the power and authority to acquire, own lease, locate, install, construct, hold, maintain, control and operate at seaports a system of terminal railroads, in conjunction with such seaport facilities, further provides, with reference to the personnel employed in the operation of such railway facilities, as follows:

". . . And the state, acting through the said department, shall have the right and authority to make agreements as to scale of wages, seniority and working conditions with locomotive engineers, locomotive firemen, switchmen and switch engine foremen and hostlers engaged in the operation of the terminal railroads provided for in this section and the service and equipment pertinent thereto. And should the said department exercise the authority herein given then in such event it shall be the duty of the said department to make such agreements with said employees hereinabove specified, in accordance with the act of congress

known as the Railway Labor Act (U. S. C. title 45, sections 151-163) as amended or as hereinafter amended to the end that the same agreements as to seniority and working conditions will obtain as to said employees and the standard rate of pay provided, as are in force relative to like employees of interstate railroads operating in the same territory terminal railroads authorized hereby. . . ."

As you will note, yardmasters, the subject employees herein under consideration, are not mentioned specifically within the quoted portion of the above statute. However, in a former opinion rendered to you under date of April 6, 1950, in construing the above statutory provisions, I expressed myself to be of the opinion that it was the intention of the Legislature, by the adoption of such statute, to authorize the Department of State Docks and Terminals to deal with all employees, both operating and non-operating, of its terminal railway facilities, in accordance with the terms of the Federal Railway Labor Act, (U. S. C., Title 45, Sections 151-163, as amended). Based upon the reasoning, logic and legal authorities set out in such opinion, I am clearly of the opinion that the employees here considered fall within the purview of the above statute, and that the department is authorized to enter into such agreements with said employees as are authorized by Title 33, Section 17, supra, which includes agreements as to scale of wages, seniority, and working conditions.

Inasmuch as you advise that the department has seen fit to exercise such authority with reference to agreement with said employees, the latter provisions of the above quoted statute become pertinent to your inquiry. This proviso, as I have above shown, is the effect that in such event it is the **duty** of said department to make such agreements with its railway employees, in accordance with the Railway Labor Act, as to insure that like agreements as to seniority, working conditions and **rate of pay** will obtain as to such employees as are in effect with reference to like employees of interstate railroads operating in the same territory. I note from the proposed agreement attached to your request that such agreement will likewise apply to like employees of the Gulf, Mobile and Ohio Ry., the Louisville and Nashville Railroad and the Southern Railroad, the three lines we know to be operating in the same territory with the terminal railways of the Department of State Docks and Terminals, and that such agreements have been negotiated in accordance with the Railway Labor Act, referred to and incorporated within Title 33, Section 17, supra.

Under such conditions, it is my opinion that, the Department of State Docks and Terminals having elected to enter into agreement with such employees, it becomes not only the right, but the duty of said department to provide like terms as to seniority, working conditions, and rate of pay to the employees of the terminal railways operated by the State Docks and Terminals. I must, therefore, advise, with reference to your first inquiry, that you are authorized to enter into the proposed agreement with the yardmasters employed by the State Docks and Terminals.

Inasmuch as you advise that the terms of such agreement will provide to such employees compensation in excess of the statutory maximum set out in Title 41, Section 152, supra, I must give consideration to such statute, which provides as follows:

> "§ 152. Amounts of salaries.—When not fixed by law or provided for in the pay plan of the merit system, the governor is authorized to fix or approve salaries of officers and employees of the State of Alabama, but no salary or compensation, including those provided for in the pay plan of the merit system, shall be fixed or approved in excess of five thousand seven hundred dollars per annum unless a different maximum is fixed by law."

In my judgement, such statute does not here apply and can in no way limit, increase, diminish, or control the salary or compensation of the employees here considered. By reason of Title 55, Section 301, Code of Alabama 1940, as amended by Act No. 349, General Acts 1943, page 332, the employees with which we are here concerned are specifically exempt from the provisions of the Merit System, and any pay plan pertaining thereto. Furthermore, the compensation of such employees, in the event the department chooses to enter into agreement with them which it has so done, is fixed by independent statute, hence there is no authority vested in the Governor to fix such salary or compensation. Lastly, the compensation of such employees being determined by independent statute, under the terms of which said employees may receive in excess of the statutory maximum of $5700.00 annually provided for within Title 41, Section 152, supra, I must advise that said limitation is here without application and that you may enter into the proposed agreement at the stated rate of pay with the employees here concerned in no violation of Title 41, Section 152, supra. I might add that further increase in pay under the terms of such agreement wherein the rate of pay is based upon the cost of living, as shown by the Bureau of Labor Statistics Price Index, would in no way be affected by Title 41, Section 152, supra.

In short, it is in my opinion, that the Legislature of Alabama, being in accord with the purposes and intent of the Railway Labor Act to provide for prompt and orderly settlement of all disputes concerning rates of pay, rules or working conditions and to avoid any interruption to commerce or to the operation of any carrier engaged therein, has seen fit to incorporate the provisions of same into the statutory law of this State pertinent to the railway employees of the Department of State Docks and Terminals, and, therefore, the compensation of such employees is governed by the provisions of Title 38, Section 17, supra, and the limiting features of Title 41, Section 152, supra, have no application thereto.

Very truly yours,

A. A. CARMICHAEL,
Attorney General.

December 29, 1950

Hon. John E. Mandeville, Clerk,
Circuit Court, Mobile County,
Mobile, Alabama

Officers and Offices—Military and Naval Affairs.

1. The participation of the United States in the Korean conflict constitutes "an existing state of war" within the meaning of such term as used in Act No. 2, General Acts, Extraordinary Session, 1942, page 9, approved November 20, 1942, permiting county officials of the State of Alabama to be in the military service of the United States at the time when there is "an existing state of war" between the United States of America and any other country, without vacating their offices.

2. The duly elected clerk of the Circuit Court of Mobile County, Alabama, a member of the National Guard, would not vacate his office upon being ordered into active military service, notwithstanding

the fact that the United States is participating in the Korean conflict without a formal declaration of war.

3. The conclusions reached in this opinion are applicable to Act No. 1, General Acts, Extraordinary Session, 1942, page 7, and to Act No. 8, General Acts, Extraordinary Session, 1942, page 14.

Opinion by the Attorney General.

Dear Sir:

Your request for an official opinion bearing date of August 4, 1950, is as follows:

"Your official opinion is requested as to the following question:

"'AN ACT To permit county officials of the State of Alabama to be in the military service of the United States at a time when there is an existing state of war between the United States of America and any other country, without vacating their office; and to provide for the appointment, authority, and compensation of temporary acting officials during their absence', was passed at the Extraordinary Session of the Legislature of Alabama of 1942, and was approved on November 20th, 1942.

"As you know I am duly elected Clerk of the Circuit Court of Mobile County, Alabama, having been elected in 1946 by the vote of the people of this County for a term beginning in January of 1947, running for six years through January of 1953.

"At the same time I am also a member of the Alabama National Guard, being a Lieutenant Colonel of Infantry, Executive Officer of the 200th Infantry Regiment, which is a part of the 31st Infantry Division, and have been a member of the Alabama National Guard since about January of 1929 continuously up to this date.

"In view of the fact that it is almost a certainty that the War Department, within a short time, will order the 31st Infantry Division of the Alabama National Guard into active federal service, I am desirous of determining by official opinion from your office, the answer to the following question:

"Question: Does the Act quoted above, passed by the Special Session of our Legislature of Alabama in 1942, apply under the present existing situation, in view of the fact that actually there is a state of war existing between the United States of America and the Red forces of North Korea?

"I respectfully request a prompt official opinion in reply to the above question."

Section 1 of Act No. 2, General Acts, Extraordinary Session, 1942, page 9, approved November 20, 1942 (the title to which Act you have set out in your inquiry), is as follows:

"The office of any official of any county of the State of Alabama, who has heretofore entered, or who shall hereafter enter the military

service of the United States at a time when there is an **existing state of war** between the United States of America and any other country, shall not be deemed vacated by reason of such service, nor shall such military service be deemed acceptance of, or the holding of, an office of profit under the United States within the purview of Section 280 of the Alabama Constitution of 1901." (Emphasis supplied.)

Your inquiry requires an interpretation of the term "an existing state of war" as employed by the Legislature in Section 1, supra. Whether there is actually a state of war existing between the United States of America and North Korea does not submit readily to a lucid rationalization. The incongruity presented by the armed conflict between these two countries is that, while the United States is effecting partial mobilization and its troops are engaging the enemy in a bitter and sanguinary battle, all of its measures have been activated under the auspices and the banner of the United Nations. Ostensibly, our armed forces are functioning as a part of the United Nations police force to quell an unmitigated act of armed aggression in violation of the United Nations Charter.

So far as I have been able to ascertain, there have been no decisions rendered on this precise question. Consequently, a rational solution may be reached only through a consideration of the purpose of the aforementioned statute and a study of the decisions of the courts treating the existence or non-existence of a "state of war" under other circumstances.

The case of **State ex rel. Bland et al. v. St. John,** 244 Ala. 269, 13 So. 2d 167, provides enlightment on the purpose and intent of the act in question. This case involved a quo warranto proceeding wherein the petitioner sought to establish his right to the office of temporary acting solicitor to which he had been appointed by the governor upon the entry of the duly elected solicitor into the military service of the United States. The court therein declared:

"The legislative intent is apparent in every section of the act and in its title which reads as follows: 'An Act to **permit county officials** of the State of Alabama **to be in the military service of the United States** at a time when there is an existing state of war between the United States of America and any other country, **without vacating their office;** and to provide for the appointment, authority, and compensation of temporary acting officials during their absence.' (Italics supplied.)"

It is apparent that the legislative purpose was merely to relieve "him of the duty or necessity of entering into the discharge of the duties of his office" and yet allow him to "retain his office for its term by due qualification." Ibid. Thus, the emphasis was placed on securing to a county official his right to a public office when he entered the service of his country at any time in the discharge of a duty of citizenship. Viewing retrospectively the situation existing at the time of the passage of the statute in question, it is not difficult to conclude that such was the letter and spirit of the statute, and that no technical application of the term "an existing state of war" should militate against the rights sought to be secured by that enactment. Apropos of the foregoing is the proposition vouched in **Brown v. Bernstein,** 49 F. Supp. 728:

"Executive Orders issued and legislation enacted during a national emergency and in time of war must be expressed in broad terms and generalities. In the interpretation of such legislation the court must not hunt for limitations nor scrutinize the wording with confining intent but should seek for the purpose and spirit of the enactment."

While in the present situation the United States is actively engaged in hostilities without a declaration of war, such was not the case in **Kennedy v. Cook,** 285 Ky. 9, 146 S. W. 2d 56, 132 A. L. R. 251, where a declaratory judgment was sought to determine the right of an officer in the National Guard, ordered into the military service of the United States for a period of twelve months, to continue in a state office. At the time of that decision (December, 1940) the United States was not engaged, under any guise, in armed conflict, nor had there been a declaration of war. The court was faced with the problem of whether the plaintiff, the Circuit Clerk of Wayne County, upon his induction became a Federal officer and thus held a second office of profit in violation of the State constitution. (With the question of a second office of profit, we are not concerned, if Act. No. 2, supra, is now applicable.) The court's decision that the plaintiff did not forfeit his position as circuit clerk as depicted in the A. L. R. Annotation to the above cited case, "because, as a National Guard Captain, he has been inducted into the military service of the Federal Government," was as follows:

> ". . . the court points to pertinent provisions of the National Defense Act to the effect that National Guard units shall be maintained intact as far as possible, to Army regulations providing that no additional oath, enlistment contract, or commission shall be required, to the fact that **the service is voluntary,** and is for the period of one year, saying that it can be seen that the plaintiff will remain with his unit, and will serve under the commission issued by the Governor of the state, and that he will not therefore become a Federal officer within the meaning of the constitutional provision . . . " (Emphasis supplied.) See Note, 132 A. L. R. 254.

Whether, in your case, you become a Federal officer would make no difference if a state of war, such as the act intended, exists at the time your unit is ordered into active service.

Although the case of **Darnall v. Day,** ..... Iowa ....., 37 N. W. 2d 277, decided an issue involving rights under a wartime contract, the court by way of definition stated:

> "War in the practical and realistic sense in which it is commonly used, refers to the period of hostilities and not to a technical state of war which may exist after the fighting has ended."

The following statement is formed in syllabus 1. of the above opinion:

> "As commonly understood and especially where the parties to a contract so intend, war ends when hostilities cease and the determination of the existence of war by the political departments of government is conclusive upon the courts only in matters of public concern."

Should we pursue this to its logical conclusion and consider it in the light of the decisions holding a declaration of war prerequisite to the existence of a state of war, **Bishop v. Jones & Petty,** 28 Tex. 294, **Savage v. Sun Life Assurance Co. of Canada,** D. C. La., 57 F. Supp. 620, we would find the United States in the incongruous situation of being at war without the existence of a "state of war." Such reasoning is sophistical and becomes untenable when we apply the rationale of **Hamilton v. McClaughry,** 136 F. 445. That case called for an interpretation of the phrase "in time of war" to determine whether jurisdiction of a military court-martial had been conferred under the fifty-eighth article of war. It arose during the Boxer Rebellion which allied troops, some of which the United States furnished, suppressed by force of arms. The situation was closely analogous to the present one. There was never a formal declaration of war, yet consider the opinion of District Judge Pollock:

"Mr. Justice Grier, delivering the opinion in Prize Cases, 67 U. S. (2 Black) 666, 17 L. Ed. 459, says: 'War has been well defined to be that state in which a nation prosecutes its right by force'. In the present case, at no time was there any formal declaration of war by the political department of this government against either the government of China or the 'Boxer' element of that government. A formal declaration of war, however, is unnecessary to constitute a condition of war. Adopting the definition of war above quoted with approval by the Supreme Court, the question here is whether this government was, at the time of the commission of the homicide by petitioner, prosecuting its right in Chinese territory by force of arms. It has been well said the safety of the people is the supreme law of the land. The first duty of a state is the protection of the lives and property of its citizens, wherever lawfully situate, by peaceable means, if possible; if not, by force of arms. More especially must this protection be afforded the accrediated reprsentatives of this government in a foreign country."

After referring again to the lack of any declaration of war, the jurist declared:

"Yet I am constrained to hold that by reason of the occupation of Chinese territory by a large military force of this government, under authority of the Department of War, the many conflicts between the forces of this government and the armed Chinese troops, and the recognition of a war by the Congress of the United States in making payment to the officers and men of this government there engaged on a war basis and all the other facts and circumstances in this case, at the time the homicide in question was committed there prevailed in China a condition of war, within the spirit and intent of the fifty-eighth article of war, for that this government was there asserting its right of protection over the citizens and accredited representatives of this government, and their property, by force of arms . . ."

Further light is shed upon the issue by the decision in **Arce et al v. State**, 83 Tex. Cr. Rep. 292, 202 S. W. 951, which determined that a state of war existed where Federal troops engaged in battle with Mexican troops ordered into action under the authority of the Carranza de facto government. The court related:

"Suffice to say, they (battles) did occur, and under the authorities this brought about a condition of 'war' between the two countries. It was not what the authorities may term a complete state of war, but rather in the nature of an incomplete state of war. There was no formal declaration of war as we understand the history of times between the two countries, where a state of warfare was recognized as existing between the two countries."

Further on the opinion reads:

"That a state of warfare existed between the two countries is not questioned. Brig. Gen. Enoch H. Crowder, Judge Advocate, U. S. A., has the following to say in an official opinion:

" 'It is thus apparent that under the law there need be no formal declaration of war, but under the definition of Vattel a state of war exists so far as concerns the operations of the United States troops in Mexico by reason of the fact that the United States is prosecuting its rights by force of arms and in a manner in which warfare is usually conducted.

The statutes which are operative only during a period of war have been interpreted as relating to a condition and not a theory."
(Emphasis supplied.)

The two immediately preceding cases to which I have alluded quote the definition:

"'War" has been well defined to be "that state in which a nation prosecutes its rights by force." . . .'"

Whether the absence of this element would alter those opinions it does not appear necessary to decide, for only the most naive would refuse to recognize that, although the United States has taken this momentous step as a representative force under authority of the United Nations, it is at the same time prosecuting its right by force.

Therefore, your inquiry is answered in the affirmative.

The conclusions reached in the above opinion are applicable to Act No. 1, General Acts, Extraordinary Session, 1942, page 7, and to Act No. 8, General Acts, Extraordinary Session, 1942, page 14.

Very truly yours,

A. A. CARMICHAEL,
Attorney General.

December 29, 1950

Hon. Ralph P. Eagerton,
Chief Examiner,
Department of Public Accounts,
State of Alabama,
Montgomery 4, Alabama

Schools—Veterans.

Where vocational training for veterans is conducted in county and city school systems under the administrative supervision of the State Department of Education, the State Department of Education may pay for the cost of such a program with funds appropriated pursuant to the provisions of Title 52, Sections 381-389, and 20 U. S. C., Sections 11-29, as amended (39 Stat. 929), and the fact that recipients of the vocational training program are veterans for whose vocational training the Veterans Administration reimburses the State Department of Education does not make the expenditure illegal.

Opinion by Assistant Attorney General Nachman.

Dear Sir:

Your request for an official opinion bearing date of July 20, 1950 is as follows:

"Chapter 17 of Title 52, Code of 1940, contains the sections dealing with vocational education. Section 384 states the authority of the State

Board of Education as to vocational education and section 383 defines the duties of the State Superintendent of Education with respect to vocational education. Section 386 provides the monies appropriated by the State of Alabama and the funds deposited with the treasurer under the provisions of the Smith-Hughes Act together with any other funds accruing to the state for vocational education shall be used by the State Board of Education for the purposes set forth in Chapter 17.

"Under an agreement between the State Board of Education and the U. S. Veterans Administration a program of vocational training for veterans is conducted in the several county and city school systems in the State. The cost of this program is paid by the county and city school systems and claims are submitted to the State Department of Education for reimbursements. The Veterans Administration then reimburses the State Department for payments that have been made to the county and city school systems.

"In the course of the annual audit of the State Department of Education for 1948-49 fiscal year by this Department it was ascertained that $60,000.00 of the money appropriated by the legislature for vocational education during the 1948-1949 fiscal year was transferred to the Veterans Educational Trust Fund, a fund maintained by the treasury for handling all monies received from the Veterans Administration for the veterans training program. The memorandum on the voucher that made the transfer stated, in effect, that the transfer was made in order to reimburse county and city school systems promptly for expenditures made by them for the veterans training program and, if sufficient money is provided by the Veterans Administration, the money so transferred would be repaid to the State Vocational Education Appropriation Fund. The audits of prior years of the Department of Education by the Department of Examiners of Public Accounts show that prior to September 30, 1948, a balance of $143,992.31 had been transferred and had not been restored to the State Vocational Appropriation Fund which it had been transferred to the Veterans Education Trust Fund. On September 30, 1949, the balance of such funds transferred to the Veterans Education Trust Fund from legislative appropriations for vocational education amounted to $203,992.31.

"Your official opinion is requested on the following questions:

"1. Did the transfer of money appropriated by the legislature for vocational education to the Veterans Educational Trust Fund constitute a legal expenditure of such appropriation at the time the transfer was made?

"2. Would reimbursements to county and city school systems for their expenditures for veterans training from any balance in the Veterans Education Trust Fund resulting from the transfer of vocational funds be legal expenditures of the vocational funds so transferred?

"3. If the transfers are not legal expenditures of the legislative appropriation for vocational education at the time they were made, would such transfers be legal if they were loans to the Veterans Education Trust Fund with reimbursement anticipated?

"4. If the money in question is restored to the State Vocational Education Fund, which contains the unused balance of the current appropriation for vocational education, could such money be spent legally for vocational education in the year, or years, in which restitution is made?

"Your opinion on the above questions at your earliest convenience will be appreciated."

Certain initial observations will help to clarify the answers to the specific questions which you ask in this request. The facts indicate that vocational training programs for veterans are conducted as part of the county and city school systems in the State of Alabama. These programs of training are conducted under the administrative supervision of the State Department of Education. The State Department of Education pays for the cost of administering such vocational training programs out of the funds provided by the United States and the State of Alabama, pursuant to the Smith-Hughes Act (28 U. S. C. 11-29, as amended) and Title 52, Sections 381-389, Code of Alabama 1940, as amended.

This expenditure seems clearly to be an expenditure for vocational education within the meaning of Title 52, Sections 381-389, supra. The very facts in your request indicate that the funds are used to finance programs of vocational training. The fact that veterans are the recipients of such vocational training is irrelevent. Equally irrelevant as to the legality of the expenditure is the fact that the Veterans Administration reimburses the State Department of Education for certain monies expended to provide vocational education for veterans. The money which the Education Department actually spends is properly spent for vocational training.

Further, the funds which you describe in your request all appear to be funds which are set up by the Department for bookkeeping purposes. They are not funds specifically established by legislative act. Thus, the transfer of monies from one fund to another must be considered as bookkeeping transactions.

The important question is whether or not the money which has been spent was spent for vocational education purposes within the meaning of Sections 381, et seq., supra.

I

The answer to your first question is that the transfer was a legal expenditure. The reasons set out in the introductory portion of this opinion provide the basis for an affirmative answer.

II

Your second question should be answered affirmatively, for the reasons set out in the introductory portion of this opinion. The so-called "reimbursement" is merely an expenditure of money by the State Department of Education for the purpose of providing vocational education and training.

III

An answer to this question appears unnecessary in the light of an affirmative answer to the first two questions. However, for the reasons set forth in the introductory portion of this opinion, the transfer described in this question would be legal as an expenditure for vocational education training.

IV

The last question which you ask must also be answered affirmatively. Any money which is restored to the State Vocational Education Fund may be used for vocational education in the year or years in which restitution is made. There would be no question of restoration of Federal funds to the State

Treasury. In addition, the money which has been restored by the Veterans Administration can be considered as having been either encumbered or, in effect, expended for vocational education.

Very truly yours,

A. A. CARMICHAEL
Attorney General.

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